CONSTRUCTIVE IMMUTABILITY

Samuel A. Marcosson[*]

INTRODUCTION

Steve Smith and Janet Jones are born in 1999. Smith was born in Juarez, Mexico, just south of the Rio Grande River, while Jones was born in El Paso, Texas, just north of the Rio Grande. Smith is a Mexican citizen, while Jones is a United States citizen.

Is Jones's status as a U.S. citizen, and Smith's as a non-citizen, immutable? If Smith challenges the constitutionality of a particular way in which the state favors Jones because of her citizenship, does the issue of immutability affect the outcome of his challenge?

Jones's parents, Ruth and Aaron, came to the United States in 1990. They entered the country illegally and continue to be non-citizens.

Is Ruth and Aaron Jones's status as "illegal immigrants" immutable? Is Janet Jones's status as the child of "illegal immigrants" immutable? In either case, does immutability make a constitutional difference?

Kenneth Bowers and Michael Starr are two men who self-identify as gay. They have been living together for over twenty years in a monogamous relationship. Their next door neighbors are Rick Rockwell and Darva Conger, who met on the night of their wedding, which was witnessed by over twenty million Americans on the television program, "Who Wants to Marry a Multimillionaire?" Starr and Bowers would like to obtain state recognition of their same-sex marriage, with the same legal effect as that given to Rockwell and Conger's marriage.

Are the sexual orientations of these four people immutable? Does immutability make any difference if Bowers and Starr challenge the state's refusal to recognize their relationship as at least equal to that of Rockwell and Conger?

Sarah Levy and Michael Jackson are the parents of a child, James, born in 1860. Sarah's father was a white slave owner, while her mother was a black

---

[*] Associate Professor of Law, Louis D. Brandeis School of Law at the University of Louisville. Many thanks to the participants at a panel at the 1999 Law & Society Conference, where I presented an embryonic version of this article and received vigorous and helpful comments, to the faculty at the University of Leeds (particularly Javaid Rehman and Peter Seego) who graciously hosted me in the summer of 1998 while I conducted some of the research that led to this piece, and to Nancy Levit and David Cruz for their encouragement and thoughtful comments.

slave. Michael's parents were both white. In 1880, James Jackson lives in a state which bars interracial marriage, and which classifies a person as "black" if he or she has a single drop of "black blood." Even though James Jackson is extremely light-skinned and has always considered himself white, the law treats him as black and bars him from marrying his white fiancée, Jennifer.

Is James's race immutable? If he challenges the constitutionality of the anti-miscegenation law, does it make any difference whether his racial classification is immutable?

For many years, the concept of immutability in equal protection law has been in decline in the eyes of constitutional scholars and apparently the Supreme Court, to the point where there is now a strong consensus among legal scholars that immutability is not relevant to analysis of claims brought under the Equal Protection Clause of the Fourteenth Amendment. Where once it appeared that a plaintiff moved a considerable distance towards the "Holy Land" of strict judicial scrutiny by establishing that her defining characteristic was immutable,[1] in the last quarter-century scholars have argued that the immutability of a characteristic really does not explain when the Court has applied heightened scrutiny.[2] At the same time, postmodern scholars have criticized as essentialism the very concept of immutability, because of its claim that a characteristic is timeless across cultures regardless of whether and how a particular culture perceives and treats it.[3] It is difficult to find the last academic defense

---

[1] The force of immutability in equal protection law probably reached its apex with the Court's decision in *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973), a sex discrimination case in which the plurality opinion stated that sex should receive heightened judicial scrutiny because, among other reasons, "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth."

[2] See JOHN HART ELY, DEMOCRACY AND DISTRUST 150 (1980); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 510 (1994) ("[I]mmutability remains a factor, but it is not clear that the Court will ever again make even an asymptotic approach to a claim that discrimination based on a characteristic the bearer cannot shed is intrinsically repellent to any '"basic concept of our system."'" (quoting *Frontiero*, 411 U.S. at 686)); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell"*, 108 YALE L.J. 485, 518 (1998) ("[R]ecent academic commentary seems univocal in calling for its retirement even as a factor."); Jonathan Pickhardt, Note, *Choose or Lose: Embracing Theories of Choice in Gay Rights Litigation Strategies*, 73 N.Y.U. L. REV. 921, 942 (1998) ("Arguments for suspect classification status for sexual orientation based on immutability have been almost completely rejected."); E. Gary Spitko, *A Biologic Argument for Gay Essentialism-Determinism: Implications for Equal Protection and Substantive Due Process*, 18 U. HAW. L. REV. 571, 598 (1996) ("A careful analysis of the Supreme Court's equal protection jurisprudence reveals . . . that immutability of a characteristic is neither a prerequisite to nor a sufficient condition for heightened scrutiny of a classification relating to that characteristic.").

[3] Edward Stein, *Conclusion: The Essentials of Constructionism and the Construction of Essentialism*, *in* FORMS OF DESIRE: SEXUAL ORIENTATION AND THE SOCIAL CONSTRUCTIONIST CONTROVERSY 325, 326 (Edward Stein ed., 1990) [hereinafter FORMS OF DESIRE] ("Essentialists think that being a heterosexual or homosexual is like having a certain blood type or being a person taller than six feet. . . . Even though people in past cultures may have had no idea what constitutes a gene, a hormone, an Oedipal complex or whatever the relevant properties are, they either did or did not have such properties, and thus the essentialist would claim that they

of immutability or the last call for stressing it in constitutional litigation.[4]

At the same time immutability has been in decline in equal protection analysis, there has been a surge in consideration of the equal protection ramifications of legal classifications based on sexual orientation and, more recently, gender identity.[5] The Supreme Court, lower federal courts, and commentators have been assessing the way in which the equal protection claims of lesbians, gay men, bisexuals, and transgendered (LGBT) people should be resolved. Importantly, the wide consensus of scholars that sexual orientation (and, where the analysis has included them, gender identity and transgender status) should be a suspect classification subject to the most exacting judicial scrutiny[6] has been met by an even stronger counter-consensus

---

were thereby either heterosexual or homosexual . . . ."). The connection between essentialism and immutability is not—forgive me—immutable, as Professor Stein notes. *Id.* at 326-27 ("While there are no doubt some connections among whether or not the property of being a homosexual is an objective property and whether or not a person can choose [it] . . . these various claims do not amount to the same thing."). Nevertheless, critics of immutability often treat the concept as if it entails a claim about the origins of the characteristic, and even more often assume that a socially constructed category (e.g., sexual orientation) cannot produce classifications (e.g., heterosexual) that are immutable. One of my purposes in this article is to break down that premise by more carefully probing the effects of certain kinds of social construction.

[4] In fact, even Professor Gary Spitko—who accepts and would rely in significant ways on evidence that sexual orientation "speaks to the reality of an irreducible essentialist conception of homosexuality" and that it "involves no volition," Spitko, *supra* note 2, at 621-22—emphatically rejects invocation of the immutability argument. *See id.* at 601 (calling immutability "neither necessary nor even [a] significant factor[] in the suspect classification analysis").

[5] The first discussion in a law review of the notion that discrimination against homosexuals could, in some fashion, be the subject of strict scrutiny appeared in Volume 91 of the Harvard Law Review in 1977. *See The Supreme Court 1976 Term*, 91 HARV. L. REV. 141, 151 (1977) (discussing case involving minors' access to contraception as potentially having implications for constitutional claims of homosexuals). That was the first relevant "hit" produced by a Westlaw search using the search terms "homosexual" and ("strict scrutiny" or "suspect class") and (before January 1, 1980). That discussion—tangential at best to the subject of the article—was the only treatment of the matter prior to 1980. On the other hand, an identical search limited to articles between 1980 and 1990 produced 300 hits, the vast majority of them relevant to the issue of the proper level of scrutiny for consideration of discrimination against gay men and lesbians. And since 1990 (as of August 17, 1999), the search produced 1,646 articles.

[6] As Professor Lynn Wardle pointed out in 1996 and 1997, the scholarly literature on the subjects of same-sex marriage and parenting has been "drastically imbalanced" in favor of expanding the legal rights of gay couples to marry and gay people to adopt, gain custody, enjoy visitation rights, etc. *See* Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 836-37 & nn.10-17, app. A & B (describing and collecting articles regarding parenting rights for lesbian and gay parents); Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 3 n.3, app. B (collecting articles regarding same-sex marriage). Virtually all of the articles noted by Professor Wardle advocate applying heightened judicial scrutiny to classifications based on sexual orientation, as do an impressive array of articles on other areas involving discrimination (e.g., the military's "Don't Ask, Don't Tell" policy) against sexual and gender minorities. Professor Wardle attributes the imbalance to "[a]n apparent academic taboo against publicly voicing opposition to homosexual interests." *Id.* at 18. He never considers the possibility that the imbalance is produced not by a "taboo," but by the fact that the vast majority of scholars are simply persuaded by, and believe they can add to, the legal arguments supporting same-sex marriage and protection of the rights of lesbian and gay parents.

of the federal courts that classifications based on sexual orientation are to be reviewed by judges under the most forgiving standard, the rational basis test.[7]

In applying the rational basis standard, the courts have rejected the plaintiffs' arguments urging use of a higher level of scrutiny, arguments that have often included immutability, despite the disdain academic commentators have shown towards the concept.[8] Indeed, the perceived failure of the argument as deployed by the litigators is an important part of the reason commentators have been urging its retirement.[9]

And, to further muck the immutability waters, the litigation campaign on behalf of sexual and gender minorities has been only part of the LGBT civil rights movement. At least as important has been work on the political (organizing, lobbying, and protest activity) and social fronts (the emerging visibility of LGBT people and our relationships, and the transformation of our portrayal in mass media) in pursuit of a cultural shift in the status and respect accorded to LGBT people and their relationships.[10] Given the importance of these efforts alongside litigation as part of this (and any) civil rights movement, any reckoning with the immutability argument must consider not just its viability in court, but also its implications for social and political action.

The juxtaposition of the decline of immutability with the onset and growth of the LGBT civil rights movement is ironic and unfortunate. Properly understood and argued, immutability has resonance both within and outside the legal sphere, and can be of particularly great force in winning the fight for equality for sexual and gender minorities.

In this Article, I will argue that the concept of immutability can and should be revived as an important component of equal protection arguments. In Part I, I will establish a working definition of immutability, explaining that the concept does not require absolute

---

[7] *See* WILLIAM B. RUBENSTEIN, SEXUAL ORIENTATION AND THE LAW 610, 641 (2d ed. 1997) (noting that *Watkins v. Perry*, 837 F.2d 1428 (9th Cir. 1988), was "the first federal circuit court decision finding heightened scrutiny for lesbians and gay men," and that even this single departure from the consensus was vacated by the en banc court of appeals in *Watkins v. Perry*, 875 F.2d 699 (9th Cir. 1989) (en banc)).

[8] *See* Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237, 277-79 n.189 (1996) (noting the author's own use of immutability in several briefs filed in the Supreme Court, despite her concern that problems with the argument "may mean the approach is ultimately ill-considered"); Halley, *supra* note 2, at 510-11 (discussing the "startling *resorgimento* of immutability-based arguments among gay-rights advocates notwithstanding their anemic condition in Supreme Court thinking and in the academic literature").

[9] *See* Halley, *supra* note 2, at 514 (noting the "lackluster track record" of the immutability argument in gay rights litigation).

[10] *See* Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. REV. 967 (1997) (advocating a focus on "culture shifting" rather than "rule shifting" as the strategy most likely to achieve genuine equality for sexual and gender minorities).

immutability for it to provide the basis for a powerful legal argument. In Part II, I will assess the time and context, concluding that this is a constitutional moment in which immutability can be important, even if it has not been so in the last twenty years. Even if immutability is, as its critics argue, of little relevance in whether a trait is subjected to strict judicial scrutiny, that charge has lesser importance in light of the diminishing significance of tier-based equal protection analysis that has marked the Court's most recent Fourteenth Amendment cases.

Next, in Part III, I will propose a new vision of immutability, which I call "constructive immutability," which overcomes the objections of social construction theory by showing that a characteristic can be, for all relevant legal and political purposes, immutable even if it is the product of social construction. The underlying premise of constructive immutability—that social and cultural influences shape individual identity—finds strong support in the leading approaches to cognitive psychology, which explore the great influence of culture and external relationships on the development of the self. Borrowing in part from cognitive psychology theorists and their understanding of how individuals both develop self-concepts and come to understand the relationship between the self and others, I will argue that the power of a constructed category can be so overwhelming, and its terms, assumptions, and normative social requirements so deeply ingrained into the members of the society, that it is experienced at the individual level as immutable. Such powerful social constructs are often the device through which cultures identify, define, and privilege the society's favored groups, simultaneously creating and maintaining a disfavored "other." Thus, when government acts on the basis of a characteristic as to which social constructs have produced the widespread perception of immutability, our alarm bells should go off. There is good reason to suspect that the classification is a facet of broader social disadvantaging of a disfavored group.

In Part IV, I will consider the implications of a jurisprudential reliance on constructive immutability in the specific context of litigation challenging discrimination against sexual and gender minorities. The issue of whether to rely on immutability as an equal protection argument has been debated most heavily in this context, making it the obvious case study to examine the strength of my proposal. My goal in Parts II-IV is to fill the gap identified by Dean Ely more than two decades ago, a gap that still exists today: "it is often said that the immutability of the classifying trait ought to make a classification suspect . . . . [N]o one has bothered to build the logical bridge, to tell us exactly *why* we should be suspicious of legislatures that classify on the basis of immutable characteristics."[11]

[11] ELY, *supra* note 2, at 150.

Finally, in Part V, I will make the arguments more concrete by illustrating how immutability might be used in three contexts: a brief using constructive immutability in an equal protection lawsuit challenging anti-gay discrimination; a speech on the floor of Congress during debate over proposed anti-discrimination legislation; and the story told by a gay daughter "coming out" to her parents.

I. TERMS OF ENGAGEMENT: SUBSTANTIAL IMMUTABILITY

Immutability: *The condition of a characteristic or trait such that it is or is experienced as (1) either unalterable by a voluntary act of will by the individual, or alterable only with substantial cost or difficulty to the individual; and (2) not having been acquired through the voluntary choice of the individual.*

Any thorough consideration of the relevance of immutability in the law requires us first to establish a working definition of the term. The one I have proposed has two elements: the first dealing with the alterability of the characteristic and the second with its origins.

The first part of the definition is not confined to what might be termed "pure immutability," which would include only those characteristics that simply do not change under any circumstances. This definition goes beyond such traits in two ways.

First, it does not require that a characteristic can never change; it simply requires that change cannot be brought about by a choice to be made by the individual with the characteristic. A simple example: height is not immutable in the sense that it never changes; it changes drastically for almost everyone from the time they are born at least through adolescence. People grow up. But for almost all of us, the changes involved in growing are outside our control or choice.[12] The fact that Billy is sixteen inches long at birth, five feet tall at the age of twelve and six feet tall at the age of seventeen is a process of change he did not control, consciously or unconsciously. Height qualifies as an immutable characteristic under my definition.

That is the easy case: few would dispute that a characteristic may be regarded as immutable even if it can change via a natural progression like growing up. It is more important to recognize that the same can be true of a characteristic that changes *through human intervention.* The key for us is that it is not mutable by the voluntary, relatively unaided actions of the individual possessing the trait. Insanity, for example, is not (or at least is not always) permanent; treatment through

[12] To be sure, some individuals may speed up the growth process through the use of drugs. *See Growth Hormone Treatment: What to Expect, at* http://www.hgfound.org/growthhormone.html (last visited Oct. 27, 2000) (providing overview of benefits and risks of hormonal drug treatment for children experiencing unusually slow growth). Those unusual cases, typically involving an urgent medical need created by an abnormal growth rate, are outside the typical experience and are rare enough to permit us to make the rough generalization that the process of growing up from infancy to our adult height is not one over which we exercise control.

therapy and/or medication may restore sanity. But acting on her own, the insane individual will ordinarily not be readily capable of changing that status.

The second way in which I depart from pure immutability is that a characteristic should be treated as immutable even if it potentially can be changed by the individual, if to do so would involve substantial difficulty or cost.[13] This departure from pure immutability can be illustrated once again with reference to height: technically, height can be changed. Assume, for example, that the government disqualifies from public employment opportunities any person over 6 feet tall. A person 6' 3" tall could avoid the effect of this discrimination by choosing to lop off her feet and enough of her legs below the knees in order to be 5' 11". In that absurd sense, height is not immutable. But the cost to the individual of exercising the "mutability potential" and changing the characteristic is extraordinarily high—high enough that taking such an action should never be a precondition for equal treatment. For our purposes, height is immutable.

Professor Robert Wintemute of King's College in England has quarreled with the proposition that anything other than absolute immutability should count, arguing "difficulty of change is not sufficient and that immutability must mean impossibility of change (combined with absence of initial choice) so as to place a manageable limit on the number of 'immutable statuses.'"[14] It is not clear why "impossibility" is an appropriate standard, and even less clear why we should even be concerned with placing some artificial limit on the number of "immutable statuses." It is difficult to believe that Professor Wintemute really means "impossibility." He would agree, I assume, that one's height is sufficiently immutable so that the possibility of dismemberment would not take it outside the class. Thus, it is really a question of how high to set the hurdle—of how much difficulty or cost is sufficient for us to say that the law ought to treat a characteristic as immutable.

More fundamentally, Professor Wintemute implicitly argues for "manageability" as the basis for answering the "how high" question—we should set it very near actual, complete impossibility because otherwise the class of immutable statuses will be unmanageable. This standard reflects his discomfort with the immutability argument itself,

---

[13] *See* Fernando J. Gutierrez, *Gay and Lesbian: An Ethnic Identity Deserving Equal Protection*, 4 LAW & SEXUALITY 195, 222 (1994) ("[A] trait is considered immutable if to change the trait would be at a great cost to the individual, psychologically, as well as socially and economically."); Stephen Zamansky, Note, *Colorado's Amendment 2 and Homosexuals' Right to Equal Protection of the Law*, 35 B.C. L. REV. 221, 228 (1993) ("The immutability element, however, does not mean literal immutability—the physical inability to change or mask the trait.... All that is needed to satisfy the immutability element is that changing the trait that defines the class would involve great difficulties, such as a major physical change or a traumatic change of identity." (footnotes omitted)).

[14] ROBERT WINTEMUTE, SEXUAL ORIENTATION AND HUMAN RIGHTS 177 (1995).

against which he argues at length.[15] "Manageability," however, is a function not of the number of statuses, but of the clarity of the definition. Whether there are three immutable characteristics or 300, so long as it is manifest what renders a characteristic immutable in the eyes of the law, it will be manageable to require government to meet the same legal test before it classifies or discriminates on the basis of any of them.[16]

This in turn raises the immediate question: what constitutes a "substantial" cost or difficulty, sufficient to render the characteristic substantially immutable? I intend neither to duck nor to provide a comprehensive answer to that question. There are certain categories of cost that should presumptively qualify as substantial: physical pain; monetary expense that is not de minimis; psychic hardship; disruption to family or intimate relationships; an extended time period required to bring about the change. The presence of one or more of these costs—there may be others as well—renders the characteristic effectively immutable.

A telling example of how this principle operates is pseudofolliculitis barbae (hereinafter "PFB"). PFB is a skin condition which happens to be associated with race;[17] for current purposes, it is enough to note that it is extremely painful and potentially harmful for a person with PFB to shave.[18] For that individual, a beard may be seen as an immutable characteristic in the sense that, while it *can* be changed, it would involve substantial cost and difficulty to do so.

It is important to recognize one other type of difficulty, one which will be crucial to our understanding of the relationship between law and immutability. I refer to *legal difficulty*—barriers, either absolute or effectively so, which render it so difficult to change the characteristic that it might as well be immutable. Consider, for example, the "Don't Ask, Don't Tell" policy of the U.S. military, which discriminates against lesbian and gay servicemembers by subjecting them to discharge if they engage in homosexual conduct—which is defined to include statements acknowledging one's homosexuality.[19] For pres-

---

[15] *Id.* at 174-83.

[16] As I will make clear in Part II, this does not mean that all immutable characteristics must be treated alike as either legitimate or illegitimate grounds for governmental action. The importance of immutability is not that it overrides all other factors; characteristics may be alike in their immutability but different in some other relevant way(s). These other differences can swing the balance, producing the conclusion that governmental classifications on the basis of some immutable characteristics are acceptable while others are not. *See infra* Part II.A.

[17] *See* Bradley v. Pizzaco of Neb., Inc., 939 F.2d 610, 612 (8th Cir. 1991) ("The record shows PFB almost exclusively affects black males and white males rarely suffer from PFB or comparable skin disorders that may prevent a man from appearing clean-shaven.").

[18] *See* ROBERT L. HERTING, JR., UNIVERSITY OF IOWA FAMILY PRACTICE HANDBOOK, ch. 13 (3d ed. 1999), *available at* http://www.vh.org/Providers/ClinRef/FPHandbook/Chapter13/02-13.html (last modified July 20, 1999) ("Scarring may occur with destruction of the hair follicle with severe infections. Tenderness, itching, and pain may occur.").

[19] *See* Able v. United States, 880 F. Supp. 968, 975 (E.D.N.Y. 1995) (government "designed a

ent purposes, the important component of this policy is that it creates a presumption that the servicemember who has engaged in some form of homosexual conduct is, in fact, homosexual. It then purports to allow the individual to rebut that presumption by demonstrating that he or she is *not* gay, despite the conduct[20]—it was an aberration, for example, perhaps produced by intoxication. But in practice, once homosexual conduct is established, the servicemember is so conclusively presumed to be gay that the label is, for purposes of the policy, *immutable*.[21]

The point is that the immutability label is not meant to describe some Platonic ideal of immutability, and hence does not depend on the scientific or natural accuracy of the label. We are attempting to decide how the law should treat immutable characteristics. Because the characteristic need be immutable only in ways relevant to the law, substantial immutability is sufficient.

Apart from not requiring pure immutability, the definition I propose also does not refer to the origins of the trait beyond saying that it must not have been the product of voluntary choice. It does not require that the trait be "biologically predetermined."[22] Certainly, there will be circumstances in which the lack of voluntary choice will be (at least in part) the result of biology. Sex and race are examples of this possibility, although even these traits are not entirely biologically predetermined but also result from substantial social construction, an important point I will develop more fully below. But biology is not the only producer of involuntariness, as is clear from the concept of coercion in criminal law.[23]

Nor does it necessarily matter whether it was "fixed at such an early stage in life" that a person "cannot be held morally responsible for it."[24] The connection between immutability and moral responsibility is not temporal. A medical condition, for example, may be acquired quite late in life—prostate cancer, for instance—but its immu-

---

policy that purportedly directs discharge based on 'conduct,' and craftily sought to avoid the First Amendment by defining 'conduct' to include statements revealing one's homosexual status"), *vacated by* 88 F.3d 1280 (2d Cir. 1996).

[20] *Id.* at 972.

[21] *Id.* at 976 (concluding that there is no "realistic opportunity to rebut the presumption"). Paradoxically, this "legal immutability" can make even an inaccurate description immutable—it can lead us to the conclusion that a self-identified heterosexual individual, whose sexual behavior is with and erotic attractions are overwhelmingly to members of the opposite sex, is "immutably gay" because the law renders him so. To the accusation that this renders my analysis absurd, my answer is that the absurdity lies in the military's policy, not in my definition of immutability.

[22] NICHOLAS BAMFORTH, SEXUALITY, MORALS & JUSTICE: A THEORY OF LESBIAN AND GAY RIGHTS LAW 203 (1997) (discussing immutability in context of sexual orientation).

[23] *See, e.g.*, KY. REV. STAT. ANN. § 501.090(1) (Michie 1999) ("In any prosecution for an offense other than an intentional homicide, it is a defense that the defendant engaged in the proscribed conduct because he was coerced to do so by the use of, or a threat of the use of, unlawful physical force against him or another person . . . .").

[24] BAMFORTH, *supra* note 22, at 203 (footnote omitted).

tability (and its moral irrelevance) is identical to a congenital condition such as spina bifida or Downs' syndrome.

The final element of the definition requiring explanation is that it does not require that the trait actually be unamenable to voluntary change, but only that the person experience it that way. Theories of social construction recognize that human perceptions of self are deeply influenced by cultural context.[25] If in a particular time, place, and social structure, individual categories are constructed (unintentionally or otherwise) to create in the individual the lived experience/perception that the characteristic is immutable, there are two ways of looking at the claim of immutability. To the observer dissecting the culture from outside,[26] it is the product of social construction, and hence is either unreal or at least is not immutable. However, the legal and political system that is part of the same culture that created the category must take the immutability—we might usefully call it "intrinsic immutability"—as quite real; indeed, it is virtually certain that the legal and political structure will have done much of the "constructing" that produced the experience of immutability.

Racial identity demonstrates this phenomenon. Numerous scholars have argued convincingly that race is a socially constructed category.[27] However, the social definitions of race have made it impossible for a person to adopt and live a self-identification contrary to the classification assigned to them by law or social custom. Historically, the "one drop" rule classified individuals based on the principle that "anyone with a known Black ancestor is considered Black."[28] A person treated as Black under this rule, but who self-identified as white and/or attempted to live that way, was unable to alter the social and legal classification. Her race was immutable, as Professor Hickman's story about her Uncle Jack's experience after buying a house in an all-white neighborhood in 1956 illustrates:

---

[25] *See* John Boswell, *Categories, Experience and Sexuality*, *in* FORMS OF DESIRE, *supra* note 3, at 133, 135 ("[T]he proposition implicit in the constructionist critique [is] that the experience . . . of every human being in every time and place is distinct from that of every other human being, and that the social matrix in which she or he lives will determine that experience in a largely irresistible way . . . ."). *See also infra* pp. 615-19 (discussing cognitive psychology's explanations of the development of the self and the self-concept in cultural context).

[26] Or to the post-modern observer who, despite living and having grown up in the culture, claims to have transcended its constraints, and so understands the illusory, constructed nature of its categories, and possesses a deeper insight into reality than those of us who continue to carry on the discussion as if the categories have meaning.

[27] *See, e.g.*, Cynthia L. Nakashima, *An Invisible Monster: The Creation and Denial of Mixed-Race People in America*, *in* RACIALLY MIXED PEOPLE IN AMERICA 162 (Maria P.P. Root ed., 1992) (noting that "social scientists agree that race is a socially constructed, as opposed to a biologically concrete, concept"); Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1203 (1997) (recognizing consensus view of "race as a social rather than a biological category"); Anthony Paul Farley, *The Black Body as Fetish Object*, 76 OR. L. REV. 457, 464 (1997) ("It is the colorline, not nature, which makes people white or black.").

[28] Hickman, *supra* note 27, at 1163.

> Shortly after he moved in, however, the neighbors discovered that he was a Negro, perhaps because his grandchild . . . had darker skin and curlier hair. Soon the neighbors were throwing rocks through the windows and a delegation from the neighborhood "improvement association" arrived at his door with the offer to purchase the home . . . . While these "sales discussions" were underway, "a crowd of 500 milled outside," recruited to emphasize the consequences of any failure to sell.
>
> In dealing with this appalling situation, Uncle Jack . . . implicitly denied that he was Black, telling [a] reporter . . . that he was "half Cherokee and half French Canadian," leaving out his African-American ancestry. *But . . . when he made this denial of his Black heritage, "nobody listened," and he was forced to move.*[29]

Uncle Jack was unable to change his racial classification within the socially constructed category of race, despite his attempt to do so. His race was immutable, because the legal rules and social response to him made it immutable.[30]

Nor, it might be added, has this characteristic of racial identity changed as much in the intervening forty-plus years as we might suppose. The ongoing controversy over adding a "multiracial" classification to the census[31] illustrates the continuing power of law and social rules to govern the experience of racial identity. Individuals who internally *self-identify* as "multiracial" can do so without the benefit of any legal recognition of the classification. But in seeking to change the social system of categorizing by race, advocates of the multiracial classification implicitly concede the power of the law and cultural definitions to control whether and the extent to which people with multiracial backgrounds will actually be able to live their lives that way. The social construct continues to exert power over race, and can do so to the full extent of completely controlling the lived reality of a person's racial identity, rendering it immutable.[32] Professor

---

[29] *Id.* at 1168-69 (citing *Buyer Beware*, TIME, Apr. 16, 1956, at 24) (emphasis added) (internal citations omitted).

[30] Even if Jack had been successful in convincing these social arbiters of his race that he was not Black, this would hardly have reflected genuine control over his racial identity. The phenomenon of "passing" is a manifestation of powerlessness in the face of racial subordination; as such, it constitutes taking the racial self and rendering it invisible, rather than genuine racial self-identification. *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1743-44 (1993) ("The decision to pass as white was not a choice, if by that word one means voluntariness or lack of compulsion. The fact of race subordination was coercive and circumscribed the liberty to self-define."); Sharon Elizabeth Rush, *Equal Protection Analogies—Identity and "Passing": Race and Sexual Orientation*, 13 HARV. BLACKLETTER L.J. 65, 89 (1997) (comparing Ms. Harris' statement to the experiences of gays and lesbians).

[31] *See* Bijan Gilanshah, *Multiracial Minorities: Erasing the Color Line*, 12 LAW & INEQ. 183 (1993) (discussing the multiracial movement); NAOMI ZACK, RACE AND MIXED RACE (1993) (challenging customary black and white racial designations).

[32] Not every culture's construction of race will exert the same degree of control. Some will allow self-definition to have more power over an individual's classification, *see* Hickman, *supra* note 27, at 1244-49 (discussing shifting ability of W.E.B. DuBois to choose to identify either with the Dutch side or the African side of his ancestry, depending on his location), in some instances giving greater flexibility to some racial combinations than others. *Id.* at 1246 ("[A]n American

Sharon Elizabeth Rush captured this in describing her realization that her multiracial daughter will not ultimately be able to control her racial identity:

> Her color is part of her richness; it is a part of who she is. But not everyone sees her in this loving way, and she knows this, even at such a young age. She has suffered racial discrimination. I have seen it, and I have felt it with the pain of any mother who sees her child mistreated. I hope that my daughter will be proud to identify herself as Black. I also know that no matter how she defines herself as she grows older, the social construction of race and reality is likely to define her as Black, and this will influence her perception of herself.[55]

For purposes of legal, political, and social discourse within a specific culture, then, immutability refers to a condition that was not the subject of an initial, voluntary choice, and either is, or is experienced as, not subject to change by dint of the free decision of the individual. Nothing more regarding when the characteristic was acquired, nor its basis in biology, is necessary.

II. RHYMES FOR TIMES: THE IMMUTABILITY STORY IN CONTEMPORARY EQUAL PROTECTION ANALYSIS

A. Paying the Toll: Immutability as a Factor in Deciding the Appropriate Level of Scrutiny under the Equal Protection Clause

Consider the terrain confronting a plaintiff's attorney in an Equal Protection Clause case, circa 1980. Her destination, of course, is "Violation Village," a place where the Supreme Court will hand out a decree that the government action she challenges violates the Fourteenth Amendment. The question she faces is how to get there.

Fortunately, the road map is clearly marked. The only way to the village is through Tier Town. Upon close inspection of the map, she notices that there are three roads leading out of Tier Town. The first, Strict Street, leads directly to Violation Village. It is a modern superhighway, with nary a pothole nor a cop with a radar gun along the way. In fact, there's not even a single exit ramp before Exit 1 (and only): Violation Village. The only catch is that Strict Street is a toll road, and her map does not indicate what the fare is.

The second road is Heightened Highway. It too leads to Violation Village, but winds somewhat tortuously there. It has several exits, which are not clearly marked on the map and which lead to dead ends from which one cannot get to Violation Village. The attorney is

---

of DuBois's generation whose ancestry was half Dutch and half French would have faced few constraints in choosing either nationality as 'defining' his identity.... [But] history dealt with people like DuBois, who were part African, in a way that it reserved for no other racial or ethnic intermixture."). The point is that the social construct can exert enough control to permit us to conclude that racial identity is an immutable characteristic.

[55] Rush, *supra* note 30, at 78-79.

not certain she has enough fuel to make the longer trip, and (as with Strict Street) there is a toll of ill-defined amount. Rumor has it that the highway patrol is active and well-equipped on Heightened Highway, and frequently stops motorists before they can arrive at the village.

Finally, there is Rational Road. There is no toll to take this route, but that is small comfort, since it winds around forever, seeming to go everywhere except within view of Violation Village. Worse, the road is crawling with patrol cars, who are known to enforce the most notorious speed traps in the country. There is a faint rumor that somehow someone once got to Violation Village via this route,[34] but no one really knows how they did it—or even if the rumor is true.

If one were to ask that attorney where she will focus her time and attention, she will respond, "Getting on the right road out of Tier Town." If at all possible, she must find a way to pay the toll to get on Strict Street, because once on it, she is all but assured of getting to Violation Village. And she must avoid Rational Road—the road to oblivion—at all costs.

My point in this somewhat tedious story[35] is this: For plaintiffs, equal protection law has been almost all about getting the Court to apply the highest possible level of scrutiny in assessing the government's action. Of course, any litigant wants an appellate court to apply the most favorable possible standard in any sort of litigation. But the Equal Protection Clause has been the extreme case. As Professor Fallon observed about the conventional wisdom, "it is commonplace that suspect-content tests that are '"strict" in theory' will routinely prove 'fatal in fact.' Conversely, judicial scrutiny under rational basis review is typically so deferential as to amount to a virtual rubber stamp."[36] There is, in other words, a difference between a favorable standard and an outcome-determinative standard.

No wonder, then, that the scholars of the era addressed what factors were relevant to getting the Court to apply strict scrutiny (i.e., the "toll" on Strict Street) more than they asked what constituted an

---

[34] *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (finding violation of Fourteenth Amendment despite conclusion that classifications on the basis of mental retardation are subject to rational basis scrutiny).

[35] In case it was not obvious, the "tolls" on Strict Street and Heightened Highway refer to the showings plaintiffs are required to make in order to lead the Court to conclude that some form of more exacting judicial scrutiny is applicable to the particular trait. My point in saying that the amount of the toll was not clear was that the criteria for strict and intermediate scrutiny are far from settled, as the debate over immutability as a factor illustrates. *See* Spitko, *supra* note 2, at 600 ("[T]he Supreme Court has failed to articulate cogently its means for determining whether a classification other than race or national origin deserves heightened scrutiny."). The presence or absence of police represents the likelihood the government defendant will be able to cut the plaintiff off before she reaches Violation Village; they are absent on Strict Scrutiny, and omnipresent and well-equipped on Rational Road. Enough.

[36] Richard H. Fallon, Jr., *The Supreme Court 1996 Term, Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 79 (1997).

actual violation of the Equal Protection Clause. It is against that backdrop that we must understand Dean John Hart Ely's analysis of the value of immutability in constitutional argument. In his classic *Democracy and Distrust*,[37] Ely asked not whether immutability was relevant to whether a government action violated the principles underlying the Fourteenth Amendment, but whether it was relevant to the application of strict scrutiny:

> Classifications based on physical disability and intelligence are typically accepted as legitimate, even by judges and commentators who assert that immutability is relevant. The explanation, when one is given, is that those characteristics (*unlike the one the commentator is trying to render suspect*) are often relevant to legitimate purposes. At that point there's not much left of the immutability theory, is there?[38]

In short, according to Ely, the immutability of race does not explain why race has been held to be a suspect classification, since other, equally immutable traits have *not* been deemed suspect. At most, immutability functions as a proxy for the illegitimacy of the classification. The important question is not whether the characteristic is immutable, but whether it is often, rarely, or never a legitimate basis for government action. I call this question "expected relevance," since it asks not whether the characteristic is relevant to the particular government action, but how often it is likely to be relevant. The less often it is relevant, the more suspicious courts will be when it is used, according to Ely. In Ely's formulation, low expected relevance rather than immutability is the toll for entry onto Strict Street.[39]

Certainly, Dean Ely was correct that the relationship between purpose and action is crucial in the courts' determination of what level of scrutiny is appropriate in a particular instance.[40] Neverthe-

---

[37] ELY, *supra* note 2.

[38] *Id.* at 150 (emphasis added).

[39] *See also* Spitko, *supra* note 2, at 601 (finding in Supreme Court cases the principle that government distinctions drawn "on the basis of a characteristic that otherwise would be irrelevant to an individual's ability to contribute to society [are] inherently suspect . . . and thus . . . deserving of heightened equal protection scrutiny"). I hasten to add that the simple label "expected relevance" is an oversimplification of Dean Ely's explanation of strict scrutiny, which is much more famous for its identification of process failure in general than for its stress on expected relevance in particular. *See* Jed Rubenfeld, *The Moment and the Millenium*, 66 GEO. WASH. L. REV. 1085, 1102 (1998) ("From criminal procedure to voting rights to the protection of minorities, constitutional law could, Ely argued, 'overwhelmingly' be viewed as safeguarding the democratic process, rather than imposing any independent 'substantive values.'"). Thus, the driver seeking entry onto Strict Street is best off if she has both low expected relevance and other indicia of process failure. But Ely does stress expected relevance as the component of the test possessing the explanatory force others have mistakenly attributed to immutability, and so I concentrate on that portion of his argument.

[40] An analogy to Title VII is helpful in illustrating this point. In my Employment Discrimination seminar, I point out to my students that race is the only category for which Title VII does not provide employers a bona fide occupational qualification defense. *See* 42 U.S.C. § 2000e-2(e) (1994) ("[I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin . . . where religion, sex, or national origin is a bona fide occupational qualification."). What is different, I ask them,

less, Dean Ely's conclusion that immutability has no force does not follow from this analysis. His "expected relevance" explanation for which level of scrutiny is applied falls short of making this case. He shows that there are some "immutable" characteristics (e.g., intelligence, physical disability) as to which courts treat government classifications with great deference, and from this asserts that immutability does not correlate with strict scrutiny.[41] But this argument is both curiously descriptive and incomplete.

Ely's argument, echoed more recently by Professors Kenji Yoshino and Janet Halley,[42] is descriptive in that he merely breaks down what

---

about race as compared to sex, national origin, and religion? The answer, of course, is that race is rarely (if ever) relevant to job performance. Title VII manifests a deep skepticism that race can be a legitimate job requirement—so deep that the statute is outcome-determinative on the point. *See* William R. Bryant, Note, *Justifiable Discrimination: The Need For a Statutory Bona Fide Occupational Qualification Defense For Race Discrimination*, 33 GA. L. REV. 211, 213 (1998) ("Congress did not include a bona fide occupational qualification ('BFOQ') for race in Title VII, presumably because it believed that there were no situations where the race of the employee would be relevant to job performance.").

More frequently, however, there is a legitimate relationship between the other grounds prohibited by Title VII and the employer's goals. Congress was less skeptical regarding the possible legitimacy of sex, religion, and national origin—skeptical enough that they are protected by the statute, of course, but accompanied by a BFOQ defense leaving some room for the employer to prevail.

The same notion is reflected in Dean Ely's comment, and in the three levels of scrutiny the Court has generally brought to bear in equal protection cases. When the Court is most skeptical that a characteristic is likely to be relevant, the level of judicial scrutiny is highest—strict scrutiny. Indeed, for the last half-century, strict scrutiny on questions of racial discrimination has been as fatal in fact as Congress' refusal to provide a race-based BFOQ defense in Title VII. When the courts are dubious (but not quite so dubious) of the potential for a legitimate connection between classification and purpose, they employ "intermediate scrutiny"—a test roughly analogous to an employer's odds of winning a case where the BFOQ defense is available: possible, but difficult. And where the characteristic is often if not always relevant to a legitimate legislative purpose (e.g., a statute requiring that a person must be able to see in order to obtain a driver's license), the rational basis test reflects this, giving the challenging plaintiff roughly the same chance of prevailing as a Title VII plaintiff trying to bring suit based on a characteristic not even covered by the statute. The parallels are illustrated below:

	EQUAL PROTECTION	TITLE VII
RACE	Strict scrutiny; fatal in fact, if not automatically.	No BFOQ defense available; fatal automatically.
SEX	Intermediate scrutiny; may be relevant; difficult for government to justify.	BFOQ defense available; difficult for employer to establish.
SIGHT	Rational basis; almost always upheld.	Not covered by statute; automatically upheld.

[41] *See also* BAMFORTH, *supra* note 22, at 204 ("[W]e do regard it as legitimate—and very far from morally arbitrary—to judge people on the basis of *certain* immutable characteristics. . . . An immutability argument . . . is analytically incomplete either as an explanation of what is wrong with hostile legal regulation or as a justification for law reform.").

[42] The descriptive voices of Yoshino, *see, e.g.*, Yoshino, *supra* note 2, at 518 (basing dismissal of immutability in part on the notion that "courts have begun to withdraw the immutability factor"), and Halley, *see, e.g.*, Halley, *supra* note 2, at 513 (urging litigators to cease using immutability because, in part, "[a]lthough pro-gay advocates often advance the argument from immu-

the Court has actually done in treating immutable characteristics. Sometimes, as in *Frontiero*, the Court has pointed to immutability as being a factor in applying heightened scrutiny. At the same time, however, "it [has] stated that many immutable characteristics, such as intelligence and physical disability, may provide the basis of legitimate discriminatory decisions."[43] Such a descriptive argument, however, is ultimately unsatisfying. If the Court has been inconsistent in its treatment of immutable characteristics, that should be an occasion for critical inquiry into the inconsistency. It is insufficient to say simply that the inconsistency shows that immutability is not all it is cracked up to be.

A better question suggests itself: Why are intelligence and disability not treated like other immutable characteristics? The Court did not say in *Frontiero* that the (relative) immutability of sex is relevant because it is a proxy for expected relevance; it said without equivocation that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth."[44] If that was a basis for subjecting sex-based classifications to heightened scrutiny, then it ought to have been relevant when it came to intelligence and disability. To the extent that the Supreme Court limited the significance of immutability in the constitutional inquiry in assessing disability in *City of Cleburne v. Cleburne Living Center*,[45] *Cleburne* should be reconsidered, because it failed to reckon properly with the relevance of immutability. To the suggestion that immutability is a weak argument in equal protection litigation, per *Cleburne*, the answer is simple: It is *Cleburne's* treatment of immutability that is weak and should be abandoned.

The key is that immutability is a *relevant* factor. Immutability need not always and automatically produce strict scrutiny to be relevant. Wholly apart from immutability, there may be other differences between the supposedly "acceptable" class of immutable characteristics—intelligence and disability—that justify according those traits less exacting scrutiny than the unacceptable ones—race and sex. The

---

tability with enthusiasm, it is clear that many judges do not find it persuasive"), on this question are surprising, given their otherwise penetrating critical analysis of the Court's performance in other respects.

[43] Yoshino, *supra* note 2, at 504. Technically, of course, Professor Yoshino's description of what the Court said of intelligence and physical disability—that they "may provide the basis of legitimate discriminatory decisions"—is true of any classification, including race and sex. I assume that his point, stated more precisely, is that the "acceptable" characteristics more frequently provide a legitimate basis for decisions than race and sex.

[44] Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion). It must be conceded that the plurality opinion in *Frontiero* is oddly schizophrenic, at times referring to the importance of immutability as a basis for heightened scrutiny of sex-based classifications, while at others suggesting that its importance is limited.

[45] 473 U.S. 432, 443 (1985) (rejecting the claim for heightened scrutiny for classifications based on mental retardation in part because the Court rejected the claim that the immutability of the characteristic was a sufficient basis for heightened scrutiny).

existence of other such differences does not mean that immutability is irrelevant. Thus, Professor Yoshino's confident assertion that immutability "is overinclusive because it is impossible for society to operate without discriminating on the basis of some immutable characteristics"[46] fails to prove his point. To the contrary; if anything, he has pointed to at least one factor that might distinguish some immutable characteristics from others, under the following rule:

The immutability of a trait is relevant to the constitutionality of government decisions, unless it is impossible for society to operate without discriminating on the basis of the trait.

Positing this rule, we can see a regime in which (a) immutability is relevant, but (b) immutability the rule is not over-inclusive in the sense that, in Yoshino's words, it "extends protection to more groups than we wish to protect."[47]

At most, Dean Ely's observation amounts to a litigator's tip: Do not count on immutability to do the heavy lifting for a plaintiff's equal protection claim, because the Court has not been consistent in taking it into account. But in terms of an assessment of the role immutability *should* play in equal protection analysis, it is at least as persuasive to criticize the Court's treatment of intelligence and physical disability as it is to use that treatment as a basis for dismissing immutability.

In fact, if we examine expected relevance, Dean Ely's suggested alternative to immutability, it becomes evident that neither intelligence nor physical disability is relevant to governmental decision-making often enough to justify the Court's refusal to apply heightened scrutiny.[48] In fact, intelligence is irrelevant to most governmental classifications. Eligibility for social security, for example, is not a function of intelligence, nor is the classification of someone as entitled to vote in national elections.

The areas in which intelligence might be claimed to have relevance to government decisions are generally those in which government acts most like a private decision-maker: when it is an employer, for instance, or when it procures goods or services on a contractual basis. Even in these realms, however, simple "intelligence" is so grossly overbroad that it nears irrelevance. Actual measures of the skills, experience, and abilities needed to perform a particular task are far more accurate, and relevant, measures to guide governmental decision-making.

---

[46] Yoshino, *supra* note 2, at 504.

[47] *Id.* As I will argue presently, I reject Professor Yoshino's implied premise that extending some form of heightened judicial scrutiny to classifications based on intelligence and disability would extend equal protection too far.

[48] Professor Halley hints at her discomfort with these examples, asserted almost off-hand by Dean Ely as if their high expected relevance was self-evident. *See* Halley, *supra* note 2, at 508 (calling the examples "a little dubious" because intelligence may not be unequivocally immutable and because disability may not exemplify "the class of unproblematic discriminations").

Intelligence may be only roughly correlated, or it may even be inversely correlated, to a task. As Robert Hayman, Jr., observed:

> From one perceived inability we induce a general inferiority: someone who doesn't do well on standardized tests becomes "dumb" or even "mentally retarded," and that means not only will they not become very good nuclear physicists, they also won't become very good citizens, or parents, or people. Being not smart at that one thing means that they are just plain not smart—at anything . . . .
>
> . . . [But] there are many kinds of smartness, and people can be smart in many different ways, and the fact that they are not smart—or are not made smart—in one way does not mean that they cannot be smart in many other ways.[49]

We have, of course, imbued "intelligence" with a legitimacy that explains the casual acceptance of it as a characteristic relevant to decision-making. That is why, almost three decades after *Griggs v. Duke Power Co.*,[50] there remains widespread acceptance of the notion that employers should be able to use standardized tests as job criteria despite their disproportionate impact on racial minorities.

But as a generalized, loose concept, intelligence is meaningless. It resembles most closely Justice Stewart's characterization of obscenity: We know it when we see it.[51] But our vague sense that "intelligence is often relevant" (i.e., that "smarter" people are more qualified or will perform a task better) has no demonstrable basis in reality. There are far more tasks as to which general intelligence—as distinguished from specific skills, ability, and training—is irrelevant than there are for which it is relevant.[52]

The same is true of disability, a proposition now enshrined in federal law in the Americans with Disabilities Act. Most often, people with physical and mental disabilities are entirely capable of performing a job or availing themselves of the goods and services offered by a place of public accommodation.[53] It is mere myth, fear, and stereo-

---

[49] ROBERT L. HAYMAN, JR., THE SMART CULTURE: SOCIETY, INTELLIGENCE, AND THE LAW 25 (1998).

[50] 401 U.S. 424, 429-33 (1971) (subjecting standardized tests to disparate impact analysis may violate Title VII).

[51] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define the kinds of material I understand to be embraced within [the definition of obscenity] . . . and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.").

[52] On top of this point must also be added the profoundly disturbing implications of according presumptive legitimacy to our socially constructed notion of intelligence, given that its roots lie in racialized understandings of merit. *See* HAYMAN, *supra* note 49, at 220-21.

[53] *See* Arlene B. Mayerson, *Restoring Regard for the "Regarded As" Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587, 587-88 (1997) ("During the congressional hearings concerning the ADA, Congress learned that employers routinely used employment criteria based on physical or mental characteristics to deprive otherwise qualified individuals of the opportunity to work."). From the point of view of the social constructionist, the attitudes that treat otherwise qualified people as if they are unqualified effectively create the category of "disabled" people, the category having little or no relation to the actual physical or mental capabilities of those

type that denies this—the very conditions marking *low* expected relevance. Under Dean Ely's theory, governmental classifications based on such a trait with low expected relevance should be subjected to heightened scrutiny.

If we are to base our conclusion on Dean Ely's own examples, then, only one outcome is possible: The "expected relevance" explanation holds up no better than immutability. If Ely was correct that the application of rational basis scrutiny to intelligence and disability demonstrates that immutability is a constitutional illusion, it equally undercuts expected relevance as the answer.

The same is true for perhaps the least-criticized element of the traditional strict scrutiny test: the requirement that the group have been "subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[54] The exact words of Dean Ely's challenge to immutability can be directed at this factor as well, using the model of disability to illustrate:

> Classifications based on physical disability . . . are typically accepted as legitimate, even by judges and commentators who assert that [a history of discrimination] is relevant. The explanation, when one is given, is that . . . [disability] (unlike the one the commentator is trying to render suspect) [is] often relevant to legitimate purposes. At that point there's not much left of the [history of discrimination] theory, is there?[55]

The point of this analysis is not that either "expected relevance" or a history of discrimination is meaningless; the Supreme Court has explicitly addressed them as key reasons why racial classifications must be met with the most exacting judicial examination.[56] The point is that neither expected relevance, nor a history of discrimination, nor immutability standing alone provides the full answer. Each, instead, is a factor that influences the outcome.[57] The Court is less likely to apply strict scrutiny when a rarely relevant trait is mutable, and more likely to do so where the rarely relevant trait is immutable.[58] Mutability, in other words, makes a difference.

---

individuals.

[54] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

[55] ELY, *supra* note 2, at 150.

[56] As I will discuss shortly, the utility of expected relevance is also limited by its narrow focus on constitutional equal protection standards, and hence on discriminatory decisions by governments rather than private actors. Standing alone, expected relevance has little if any force in the political and social arena in which the legitimacy and legality of private conduct are decided. *See* Samuel A. Marcosson, *The "Special Rights" Canard in the Debate Over Lesbian and Gay Civil Rights*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 137, 176 (1995) ("When litigating a constitutional claim, the plaintiff wins if she shows that a discriminatory governmental action or policy was irrational. In the private context, however, it is not enough to show that a decision was made for irrational reasons.").

[57] *See* Halley, *supra* note 2, at 507 (asserting that immutability "is not a *requirement* but a *factor*" in the application of strict scrutiny, and even then functions as "immutability-plus," requiring a link to other factors).

[58] *Id.* at 508 (responding to Dean Ely's query whether anything is left of immutability by say-

B. Deconstructing the Hegemony of Tiers

Even if Ely were correct that immutability is patently unhelpful in advancing an equal protection plaintiff closer to the goal of having the courts apply strict judicial scrutiny, that would be a dispositive argument only if strict scrutiny itself constitutes victory, as I have explained it did when Dean Ely wrote *Democracy and Distrust*. But on that key issue—the importance of the levels of scrutiny—the times are changing. We are witnessing the splendid irony of the Scalia Court acting as critical scholar—with power. The power not just to deconstruct in the pages of law reviews, but in the making (read: unmaking) of law.

I refer to the Court's gradual abandonment of the once-rigid framework of equal protection analysis, with its levels of scrutiny serving as an almost perfect predictor of outcomes (strict scrutiny, e.g., is "fatal in fact"). At one end of the spectrum, the Court seemed to apply rational basis scrutiny and yet overturned Colorado's Amendment 2 in *Romer v. Evans*.[59] On the other, in *Adarand Constructors, Inc. v. Pena*,[60] the Court adopted strict scrutiny for all racial classifications, including those employed by Congress in the exercise of its power to enforce the Fourteenth Amendment,[61] but stepped back from the Scalia Abyss of saying that this produces the automatic result that all or virtually all affirmative action programs are constitutionally infirm.[62] Instead, the center of the Court—that is to say, Justice

---

ing, "[w]ell, there might be, if there is any reason to suppose that an unrelated *immutable* characteristic is more invidious than a classification based on an unrelated *mutable* one."). Professor Halley rejects this possibility by dismissing language from the plurality opinion in *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (quoting Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 175 (1972)): that it is a "basic concept of our system that legal burdens should bear some relationship to individual responsibility." She is correct that *Frontiero* does not provide the basis for arguing that an immutable, irrelevant characteristic is "more invidious" than a mutable one—but that does not mean no such basis exists.

[59] 517 U.S. 620 (1996). Ironically it has been argued that Justice Byron White, the author of one of the most dismissive "rational basis" opinions in the Court's history, *Bowers v. Hardwick*, 478 U.S. 186 (1986), was disposed to see rational basis scrutiny as not constituting a mere rubber stamp, but the occasion for genuine, active scrutiny by the Court. *See* Bernard W. Bell, *Byron R. White, Kennedy Justice*, 51 STAN. L. REV. 1373, 1390 (1999) (book review) ("For Justice White, . . . minimum scrutiny was far from toothless, and indeed had a 'bite' that could prove 'fatal' to the challenged statute. . . . White held that a zoning ordinance requiring issuance of a 'special use permit' before anyone could establish a group residence for the mentally retarded failed to meet minimum scrutiny . . . [and] he issued a dissent arguing that given the disparities between school districts in the size of their tax bases and the absolute cap on the rate of taxation for every Texas district, the gross disparities in school funding between Texas school districts failed the minimum scrutiny test." (citations omitted)).

[60] 515 U.S. 200 (1995).

[61] *Id.* at 224 ("[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.").

[62] *See id.* at 237 ("Finally, we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.' . . . The unhappy persistence of both the practice and the lingering effects of

O'Connor—was at pains to explain that the application of strict scrutiny in the affirmative action context *just might* be different: not fatal in fact, but rather used only to put the state actor to its proof to justify what it has done.[63]

The revival of the equal protection plaintiff's hopes of victory in a rational basis case, followed rapidly by the revival of the equal protection defendant's hopes of victory despite strict scrutiny, suggests that the era in which the level itself is outcome-determinative is over.[64] Indeed, it may even suggest the gradual collapsing of the levels themselves.[65]

If this is so, then constitutional litigants and their attorneys must begin to consider what will replace the long-standing Holy Grail of equal protection analysis. This, in turn, requires rethinking strategies

---

racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it."); *cf. id.* at 239 (Scalia, J., concurring) ("To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American. It is unlikely, if not impossible, that the challenged program would survive under this understanding of strict scrutiny, but I am content to leave that to be decided on remand.").

[63] This argument that the importance of tiers is diminishing must not be overstated for two reasons. First, while it is significant that a majority of the Court may not regard the outcome of strict scrutiny analysis in affirmative action cases as a foregone conclusion, it is still momentous that the Court has come as close to that position as it has. The adoption of strict scrutiny in affirmative action cases disassociates that standard from its roots in judicial protection of groups who have suffered from a history of purposeful discrimination. It thus subjects governmental policies and actions that are very dissimilar (invidious discrimination on the one hand, affirmative action on the other) to a very similar, even if not identical, judicial critique.

Second, the Court has begun to vest the level of scrutiny determination with a new, independent significance, thereby narrowing the scope of congressional enforcement power under Section 5 of the Fourteenth Amendment. In *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), the Court distinguished traits subject to heightened scrutiny (race and sex) from those subject to rational basis scrutiny (age) in holding that Congress could not apply the Age Discrimination in Employment Act to the states. *Id.* at 83. Though definite conclusions are difficult to draw from one case, *Kimel* may well come to stand for the proposition that the states cannot be subjected to federal anti-discrimination statutes with respect to any characteristic or practice not already suspect under the Constitution, a breathtaking limitation on congressional authority. To put it another way, Congress may be limited to statutes that say, in effect, "And that goes double!" Though the tiers are becoming less outcome-determinative in some respects, the Court is hardly making them irrelevant.

[64] *See Adarand*, 515 U.S. at 268 (Souter, J., dissenting) ("[T]he Court's very recognition today that strict scrutiny can be compatible with the survival of a classification so reviewed demonstrates that our concepts of equal protection enjoy a greater elasticity than the standard categories might suggest.").

[65] *See* Cass R. Sunstein, *The Supreme Court 1995 Term; Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 77 (1996) ("*Romer* suggests that rationality review will not always result in validation; its form of rationality review is far more like the intermediate variety.... [*Adarand*] holds that strict scrutiny is not 'fatal in fact' and in that way treats strict scrutiny as if it were similar to intermediate scrutiny. The hard edges of the tripartite division have thus softened, and there has been at least a modest convergence away from tiers and toward general balancing of relevant interests."). *But see* Yoshino, *supra* note 2, at 488 n.5 (arguing that the seeming exceptions to the received wisdom that the level of scrutiny is outcome-determinative "have not seriously altered the status quo").

that have been long and widely accepted. They were selected because of their perceived merit in getting the Court to adopt strict scrutiny. But this was "merit" in a narrow sense: Their merit as strict scrutiny indicators may now be less important, or even useless, in the new deconstructed era.

Levels of scrutiny are generalizations. As Dean Ely suggested, and Title VII confirms, statutes and judicial tests alike reflect an attitude about whether a particular characteristic is likely to be relevant in the aggregate. Courts decide that strict scrutiny applies to racial classifications writ large, and then utilize that test to pass on the constitutionality of the specific classification. That is why Ely's point about strict scrutiny refers to the expected rather than the actual relevance of a characteristic.

The diminishing prominence of levels of scrutiny, in turn, also signals a decline in the significance of the expected relevance of characteristics in general. This void is being filled by the Court's consideration of the actual relevance of the characteristic in the particular case, and to the specific classification being used by the government.

This is the best reading of Justice O'Connor's careful, defensive opinion in *Adarand*. She responded to Justice Stevens' dissent in a way that explicitly and implicitly transformed the significance of the strict scrutiny tier. Justice Stevens urged analysis that would first distinguish between benign and invidious classifications—not (directly) for purposes of deciding the case, but in order to determine what level of scrutiny should apply.[66] Implicit in his formulation was the notion that each side was striving for the most favorable level of scrutiny—the standard not as means, but as end.

Justice O'Connor, however, turned this analysis on its head, saying that the Court could not divide benign from invidious classifications as the basis for choosing the level of scrutiny; rather, the application of the standard is designed to distinguish the benign from the invidious classification.[67] Since Justice O'Connor conceptualized strict scrutiny as the means "to 'differentiate between' permissible and impermissible governmental uses of race,"[68] she rejected Justice Stevens' charge that the Court failed to understand the difference "between a 'No Trespassing' sign and a welcome mat."[69] Strict scrutiny, she responded, is the lens through which we read the sign.[70]

---

[66] *See Adarand*, 515 U.S. at 243 n.1 (Stevens, J., dissenting) (criticizing the majority for "applying the label 'strict scrutiny' to benign race-based programs").

[67] *See Adarand*, 515 U.S. at 228 ("The point of carefully examining the interest asserted by the government in support of a racial classification, and the evidence offered to show that the classification is needed, is precisely to distinguish legitimate from illegitimate uses of race in governmental decisionmaking.").

[68] *Id.*

[69] *Id.* at 245 (Stevens, J., dissenting).

[70] Of course, the question remains whether a microscope is needed to tell the difference;

From the other end of the Equal Protection Clause spectrum, a similar phenomenon can be seen. In *Romer*, the Court assumed without deciding that rational basis scrutiny should be brought to bear on governmental classifications that discriminate on the basis of sexual orientation. In assessing Colorado's Amendment 2 and finding it lacked a rational basis, the Court conducted a narrow, context-specific analysis—so narrow, in fact, that some writers have criticized *Romer* because it may have little precedential value other than to establish that rational basis is the appropriate level of scrutiny for constitutional claims brought by LGBT litigants.[71]

But this critique of *Romer* misses a broader point. Like *Adarand*, it may reflect the ascendancy of an analysis that stresses actual over expected relevance. Instead of looking to whether classifications based on sexual orientation can often be expected to reflect invidious intent, the Court examined whether Amendment 2 did so, using a Title VII-like pretext analysis[72] to find it explainable by no reason other than animus.

Lest there be any doubt this is what the Court had in mind in *Romer*, one need only consult the influential amicus curiae brief submitted by Professor Tribe on behalf of himself and four other prominent constitutional scholars.[73] Tribe emphasized the particular thing Colorado had done, avoiding entirely any discussion of how the Court ought to determine whether it was permissible to classify citizens on the basis of sexual orientation. Traditional doctrine asks about the status of the group; as Tribe explained, consideration of Amendment 2 "involves a prior and more basic question" than the choice of a level of scrutiny, and "does not require any inquiry into the nature of the . . . class it might be said to target."[74] The Court plainly accepted his invitation to remove the spotlight from the constitutional status of sexual minorities, and refused to let that status control the decision.

This understanding of *Adarand* and *Romer* is further supported by the wide array of commentators who have attributed growing influence to the Court's "middle"—Justices O'Connor and Kennedy in

---

Justice Stevens might fairly have responded that Justice O'Connor was using an extraordinarily discerning instrument (akin to a microscope) when a mere pair of binoculars should be enough for courts to distinguish benign from invidious classifications.

[71] *See* Mark E. Papadopoulos, Note, *Inkblot Jurisprudence:* Romer v. Evans *as a Great Defeat for the Gay Rights Movement*, 7 CORNELL J.L. & PUB. POL'Y 165, 201 (1997) (hypothesizing that lower courts "may well have to conclude that *Romer* will strike down little more than laws that look like Amendment 2").

[72] *See* Romer v. Evans, 517 U.S. 620, 626 (1996) (dismissing Colorado's claim of Amendment 2's limited scope as "implausible").

[73] *See* Andrew Koppelman, Romer v. Evans *and Invidious Intent*, 6 WM. & MARY BILL RTS. J. 89, 117 (1997) (arguing that the Court's reasoning "seems to draw on" the Tribe brief); Papadopoulos, *supra* note 71, at 192 n.194 ("Tribe's complex and well-reasoned analysis appears to have greatly influenced the Court.").

[74] *See* Brief of Amicus Curiae Professor Laurence Tribe et al. at 3, *Romer* (No. 94-1039).

particular—as the decisive votes between its left (Breyer, Ginsburg, Stevens, Souter) and right wings (Rehnquist, Scalia, Thomas).[75] It is a hallmark of the justices who comprise the Court's contemporary center that they avoid broad, sweeping pronouncements, favoring instead careful, limited reasoning that is both case-specific and sometimes maddeningly opaque in indicating where the Court might be headed (and in providing guidance to the bench and bar).[76] It is to be expected that a Court controlled by such guarded moderates would hold close to the particulars of a specific action and eschew broad, landmark pronouncements on standards for whole groups.

Read in tandem, *Romer* and *Adarand* signal the Court's interest in narrow, case- and context-specific arguments, either about what precisely the state has done (as in *Romer*) or about the relationship between classification and the state's purpose (as in *Adarand*). The days of the primacy of general inquiry into how often the classification can be expected to be relevant are waning.

C. Immutability's Place in the New Environment

As litigants shift their attention away from levels of scrutiny, they must reevaluate earlier strategic decisions—including the scholarly consensus to avoid the immutability argument on the ground that it is unhelpful in obtaining strict scrutiny. This need for reevaluation also presents the occasion for further reflection too long absent or at least insufficiently attended to: How do legal strategies cohere with social and political arguments? In this section, I will suggest that immutability should play a significantly heavier doctrinal role in the new equal protection analysis and that it is enormously helpful on the social and political side of civil rights campaigns.

1. *Immutability in Post-Tier Constitutional Analysis*

As judges find it less useful to rely on the traditional markers of strict scrutiny, they are inevitably going to search for other criteria that identify violations of the Equal Protection Clause. In the previ-

---

[75] One might quibble with the details—some would place Justice Breyer into the middle with O'Connor and Kennedy, while others would place the latter two onto the Court's right flank and conceptualize them not as being in the "middle," but merely as being open-minded on particular issues to split away from the otherwise solid five-member bloc of conservative votes. For present purposes, it is sufficiently precise to say that Justices Kennedy and O'Connor were crucial votes (and voices) for the positions the Court took in both *Adarand* and *Romer*, putting them in the "middle" insofar as we are concerned.

[76] *See* Sunstein, *supra* note 65, at 84 ("The most distinctive feature of Justice O'Connor's argument [in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996)] is its narrowness. The opinion answers only those questions that are necessary to the disposition of the case."); Patricia M. Wald, *Upstairs/Downstairs at the Supreme Court: Implications of the 1991 Term for the Constitutional Work of the Lower Courts*, 61 U. CIN. L. REV. 771, 786-90 (1993) (discussing narrow, fact-specific reasoning of opinions by Justices Kennedy, O'Connor, and Souter).

ous section, I suggested that a generalized inquiry into the expected relevance of a trait—one of the factors identified by Dean Ely as important to the decision regarding which level of scrutiny to apply—will give way to a more particularized analysis of its actual relevance to the particular government action at issue.

In such an environment, immutability takes on increased importance. Government policies are often enacted in the hope of influencing people's decisions. For example, the Internal Revenue Code makes charitable contributions deductible from a tax payer's income, partially in the hope of influencing people to be charitable.[77] Criminal statutes, of course, are based in great part on the deterrence rationale—which is nothing more than the hope of influencing people not to do bad things.[78] It is doubtful that classifications based on immutable characteristics can or will often be relevant to government classifications as to which deterrence is the underlying goal.[79]

This point can be illustrated by considering two criminal statutes. The first penalizes people for being Methodists, while the second penalizes people for being over six feet tall. The first would discriminate on the basis of a mutable characteristic, while the second would discriminate on the basis of an immutable characteristic. Both would be unconstitutional, of course,[80] but the former only because of the

---

[77] *See* Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705, 711 (1970) ("Many of the tax expenditures were expressly adopted to induce action which the Congress considered in the national interest. For example, . . . the charitable deduction was intended to foster philanthropy . . . .").

[78] *See generally* Richard Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985).

[79] In some contexts, this point produces the far more complex issue of the distinction between conduct and status. A government policy might rationally attempt to influence behavior associated with an immutable characteristic, even if it would be impossible to affect the status of the person in his or her classification. For instance, if sexual orientation is immutable, then it would be irrational for government policy to be driven by the goal of inducing people to change their orientation. But a policy trying to influence people not to have sex with people of the same sex (or, conversely, one trying to influence people not to have sex with people of the opposite sex) could still be rational. Indeed, this point has been stressed by opponents of the immutability argument, who believe it will not answer anti-gay forces who argue that homosexual conduct is a choice. *See* BAMFORTH, *supra* note 22, at 205 (immutability of homosexual status "is insufficient by itself to explain why it is wrong to discriminate against people for actually *engaging* in same-sex sexual acts"), and that at best it will procure a limited form of equality in which sexual minorities have the right to "be" gay or lesbian but not to "act" gay or lesbian. *See* Pickhardt, *supra* note 2, at 951 (winning cases on this basis "would earn gay men and lesbians the right to be gay but not the right to do anything, either publicly or privately, that could be considered gay"). I will address the difficult problem of regulation of conduct in Part II.C.2.a. *See infra* pp. 605-09.

[80] Perhaps I should not say "of course." The Supreme Court has permitted governments to penalize members of certain religious groups if they exercise their religion, notwithstanding the Free Exercise Clause. *See* Employment Div. v. Smith, 494 U.S. 872 (1990) (holding that the Free Exercise Clause does not protect the Native American religious practice of smoking peyote). If Methodists sought to smoke peyote as part of their worship, government could penalize them—which seems awfully close to penalizing them for being Methodists. *See infra* pp. 607-08 (discussing the link between penalizing conduct associated with religious status). Nevertheless, the

Free Exercise Clause of the First Amendment. Absent this explicit protection of religious beliefs, government would be able to point to a relevant purpose of the anti-Methodist law: to discourage people from becoming Methodists and provide them a strong incentive to *stop being Methodists*. To the extent that laws favoring one group over another are motivated by a desire to influence people to change their behavior or group identification, it is plain that immutability is one of the indicia of actual irrelevance and, hence, of unconstitutionality.

This diversion into criminal law highlights an important point. Consideration of immutability in equal protection law has been impoverished by its failure to assess its place in other areas of law. Immutability has had a powerful effect across the spectrum of the law, most profoundly in the context of criminal punishment.[81] If an individual did not choose a given trait that is causally linked to activity that would otherwise be deemed criminal, and she has no control over its continuation, it ordinarily results in the withholding of criminal sanction.[82] Insanity, for instance, is often grounded in the immutability principle; we hold the insane individual blameless for his conduct in instances where he "lacks substantial capacity to . . . conform his conduct to the requirement of the law."[83]

Thus, the prominence of "decision-influencing" as a rationale for government action has deep implications for the place of immutability in equal protection law. Immutable traits are uniquely unlikely to be rationally tied to the purpose of influencing people to choose one path instead of another.[84] The whole point is that there is no choos-

---

statement in the text is technically true in the narrow sense that the Constitution does still prohibit penalties against people for their religious status.

[81] My focus is not on the shopworn debate over whether there is a "criminal personality," by which some people are predisposed by genetics to commit crimes. *See, e.g.*, HANS J. EYSENCK & GISLI H. GUDJONSSON, THE CAUSES AND CURES OF CRIMINALITY 17-18 (1989) (reviewing development of theory of "homo delinquens," the "criminal man" who was "thought to be not only predisposed but *predestined* to crime"). The question is not whether criminality is immutable, or even constitutes a definable category given the ever-changing scope of the behavior deemed criminal. The question is whether, in defining the basis for criminal liability, the law distinguishes between individuals on the basis of immutability of certain characteristics, even if in some instances the judgment of immutability might be tentative, questionable, or even untenable.

[82] *See* MODEL PENAL CODE § 2.01(2) (1962) (exempting from criminal sanction acts such as "a reflex or convulsion" or "a bodily movement during unconsciousness or sleep," because such conduct does not include "a voluntary act or the omission to perform an act of which he is physically capable").

[83] *Id.* § 4.01(1).

[84] This point is attenuated somewhat if the characteristic is immutable for some but not all members of the class; the government policy could be seen as rationally supported by the desire to influence the decisions of the "mutable" ones. *See* Marcosson, *supra* note 56, at 177-80 (discussing ramifications of possibility that sexual orientation can be mutable or immutable). While that answer creates difficulties for my analysis at first glance, it ultimately cannot carry the day. It relies on the premise that government can punish one group of people (here, the "immutable" ones) in order to affect choices made by others, a dubious proposition at best. *See id.* at 180 (arguing that a policy of this type "is corrupt even if it would influence some people, because of the immoral manner in which it treats those who could not have been influenced").

ing to be done when a characteristic is immutable. In a constitutional regime wherein judges are called upon to assess the actual rather than the expected relevance of a characteristic, the explanation most commonly offered by governments when called upon to explain themselves will be unavailable, and actual relevance will be far more difficult to show.[85]

2. *The Overlooked Role of Constitutional Arguments: Confluence with Cultural, Social and Political Stories*

Even if immutability (or, for that matter, any other argument we might consider using in constitutional litigation) were deemed to have little if any value in winning the constitutional argument, a fair assessment of its merits must nevertheless take a broader view. The assumption that the fate of an entire civil rights movement depends entirely upon creating a favorable Fourteenth Amendment jurisprudence plainly is untenable. There are so many other fora for political and social discourse—legislative debates, electoral politics, community organizations and activism, personal interactions with friends and family members—that we must also consider how effective any particular claim is likely to be in those spaces.[86] A movement may also express multiple goals, such as seeking changes in legal rules but also trying to shift social attitudes, and an argument's effectiveness depends on which purpose it is designed to serve.

In the specific case of immutability, its merit as a legal matter tells us little about its importance in political and social debate. We must ask different questions: Is there a moral force to the immutability argument that will prove persuasive to voters and/or legislators? Does the immutability argument ring true; that is, does it accurately and believably communicate the experience of the subordinated group? The answer to each of these questions points us in the direction of using the immutability argument.

---

[85] As I will show in the next section, any morality-based arguments in favor of government use of a classification are also seriously weakened when the characteristic forming the basis for the classification is immutable. *See infra* pp. 606-07. This has important implications for the constitutional issue as well. If, for instance, a government sought to defend a policy favoring people under six feet tall on the ground that being over six feet is immoral, the fact that people do not choose and cannot change their height would help to demonstrate the irrationality of that justification. In that way, immutability undermines not only the decision-altering rationale, but also the morality rationale.

[86] *See* Mark Tanney, Note, *The Defense of Marriage Act: A "Bare Desire to Harm" an Unpopular Minority Cannot Constitute a Legitimate Governmental Interest*, 19 T. JEFFERSON L. REV. 99, 101 (1997) ("With almost every legal argument so far unsuccessful in the courts, proponents of gay rights have suggested that efforts to ameliorate homophobic prejudices on a *societal* scale can be as valuable as court battles in the movement toward equality." (footnotes omitted)).

a. *The Moral Force of Immutability*

Few arguments offered on behalf of ending discrimination or inequality resonate more powerfully than immutability. It reflects the universal appeal of the concept that it is unfair to disadvantage people based on a characteristic over which they exercise no control,[87] a moral force that explains its role at the core of the justifications we assert as the basis for imposing criminal punishment. Thus, while we surely lock away both the murderer and plague victim to keep them away from the rest of us, and while we do so in both cases (in part) because we fear their presence may result in the loss of life, we "punish" and hold blameworthy only the murderer.

This moral argument has a cascading effect. First, once a trait is shown not to have been chosen and to be immutable, it is extraordinarily difficult to make the claim that people with the characteristic are, because they have it, immoral.[88] Second, the moral argument renders the discrimination itself, rather than the characteristic or the people who have it, "open to criticism as immoral."[89]

Perhaps most important, the moral force of immutability renders trifling the criticism that it would protect only the immutable status and not the outward expressions of the status. In many instances, this is said to make the protection afforded by immutability quite hollow. In the case of sexual orientation, for example, the right to "be" gay or lesbian is all well and good, but it seems to leave the state free to criminalize homosexual conduct—in which, after all, the individual chooses to engage. If the state has this power, or even the authority otherwise to discriminate against people who engage in homosexual conduct, the right won effectively consists of the right to be celibate,[90]

---

[87] *See* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972) (discrimination on the basis of immutable characteristics violates "the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing"); Bhandari v. First Nat'l Bank of Commerce, 829 F.2d 1343, 1352 (5th Cir. 1987) (distinguishing between race-based and citizenship-based distinctions on the ground that, because the former is based on an immutable trait, it "[represents] an evil, always and everywhere"); RICHARD D. MOHR, GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY AND LAW 39 (1988) ("[T]o hold a person accountable for that over which the person has no control is a central form of prejudice.").

[88] *See* Larry W. Yackle, *Parading Ourselves: Freedom of Speech at the Feast of St. Patrick*, 73 B.U. L. REV. 791, 856 (1993) ("Of course, if homosexuality is in the genes, then it is ever so difficult to ascribe moral significance to any individual's gay or lesbian inclinations." (footnote omitted)).

[89] *Id.*

[90] There is a more simplistic version of this argument, which is that the status "homosexual" is itself behaviorally-defined, thus distinguishing it from characteristics (race and sex) the law has deemed immutable in Equal Protection Clause litigation. *See generally* Feldblum, *supra* note 8, at 275-76 (discussing cases rejecting immutability argument on ground that homosexuality is defined by conduct and hence cannot be immutable). That argument is patently false; it is entirely possible (indeed, common) for people to identify themselves as heterosexual or homosexual and yet engage in no sexual acts. Catholic priests who maintain their vow of celibacy are one obvious example. The class of people with a particular sexual orientation is plainly defined by attributes other than the sexual conduct in which they engage. However, that leaves for discussion the more subtle version of the argument noted in the text—even if there is a homosex-

and as Chai Feldblum gently put it, "surely gay people want more than that."[91]

But the notion that immutability leaves the state free to penalize an individual's "chosen" expression of her immutable status fails to reckon with the moral dimension of immutability. For the critic who finds such comfort in the status versus conduct distinction, a diversion into the realm of religion might illustrate the point. Presumably, we would all agree that the state could not criminalize ordination as a Catholic priest. This is not, of course, because religion is immutable, but because of the shared societal consensus, reflected in the First Amendment, favoring free exercise of religion.[92] The moral power of that commitment, moreover, extends beyond prohibiting the state from making priests into criminals. The state could no more criminalize the core expressions of status as a priest, many of which are acts—giving communion, hearing confessions, spreading the Gospel, etc. Such regulation would violate the same moral principle that barred the status-based regulation in the first place.

The moral implications of immutability have similar breadth. They extend not just to the status, but also to the core expressions without which the status would lose its meaning for the individual. In the case of sexual orientation, those expressions include sexual conduct. This is true even though there can be heterosexuality without heterosexual conduct, just as, to complete the analogy, there are Catholic priests who engage in none of the conduct mentioned above as characteristic of a priest. The point is not whether every member of a particular class does a particular thing. The point is whether state regulation of the conduct would violate the very moral principle that bars state regulation of the status.

The proper question, then, is whether a persuasive case can be made that penalizing the conduct is tantamount, in design or effect, to penalizing the status. Plainly, criminalizing conduct typical of Catholic priests would be morally indistinguishable from criminalizing their status. And it is perhaps even more plain that penalizing sexual conduct between persons of the same sex is equivalent to penalizing homosexuals—that is, penalizing people because of their

---

ual status apart from conduct, so long as the state distinguishes based solely on the conduct and not the status, it does not need to confront the immutability argument and its attendant moral power.

[91] *Id.* at 296.

[92] *See* J. M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2366 (1997) (acknowledging that defenders of immutability can justify protection of religion despite its mutability by pointing "to the Religion Clauses as an independent justification for protection of religious minorities"). Professor Balkin's response to this argument is to say it "puts the cart before the horse" in that the Religion Clauses "exist in part because the Framers recognized that religious intolerance was an evil . . . ." *Id.* Defenders of immutability thus need to explain the basis for saying discrimination on the basis of immutable characteristics is similarly evil. That, in fact, is my present purpose.

immutable characteristic.[93] If, for instance, a state criminalizes anal intercourse between two consenting adults only when both those adults are men, as some states do,[94] it is not the act of sodomy that is being singled out for punishment. If it were, the state would criminalize the act regardless of the sex of the participants. It is the homosexuality that is being punished—and that makes it indistinguishable from penalties that are directly based on status, penalties that are immoral because of their treatment of an immutable characteristic. And when the federal government dismisses people from the military for "homosexual conduct"—defined to include the statement, "I am homosexual"—again, it is the homosexuality rather than the conduct that is being punished, and the immorality emerges again. Such conduct-based discrimination is, in the end, subject to the same moral objections as discrimination based on a status that is immutable.[95]

This is, I confess, a morality-based approach to the problem: Immutability carries with it a moral imperative. A legal system is unjust, and hence immoral, if it fails to protect individuals from disadvantages that are based on immutable characteristics. That is a part of the answer to Dean Ely's challenge: to "tell us exactly *why* we should be suspicious of legislatures that classify on the basis of immutable characteristics."[96]

Of course, grounding the significance of immutability in moral reasoning of this type risks running afoul of David Hume's centuries-old argument that morality itself is socially constructed, and hence that the recognition of rights depends ultimately on the social or-

---

[93] If that is not a sufficient moral case, there is yet another, more fundamental argument to be made, specific to the case of sexual orientation. The premise of the status versus conduct argument is that notwithstanding the immutability argument, the state would remain free to prohibit sexual conduct, leaving gay men and lesbians with the hard-won but limited right to remain celibate. There are serious moral implications to such a "deal," which I have discussed elsewhere. *See* Marcosson, *supra* note 56, at 179-80 n.127 (criticizing the "moral reasoning" making "involuntary, life-long abstinence from sex" the price of equality as "indescribably cruel and alien to American values of privacy, individual autonomy, limited government, and fairness;" and arguing that such reasoning "condemn[s] a whole class of people to lives that are, in a central way, empty of fulfillment, joy, and happiness"); *see also* E. Gary Spitko, *A Biologic Argument for Gay Essentialism-Determinism: Implications for Equal Protection and Substantive Due Process*, 18 U. HAW. L. REV. 571, 597 (1996) ("The decision to express a same-sex attraction . . . profoundly impacts the decision-maker's self-identity, happiness, [and] 'personal dignity and autonomy' . . . .") (quoting Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992)).

[94] *See* Nan D. Hunter, *Life After* Hardwick, 27 HARV. C.R.-C.L. L. REV. 531, 538 (1992) ("Since 1973, eight states have amended their laws to specify that oral or anal sex is prohibited only between persons of the same sex [and not between opposite sex partners]." (footnote and citations to statutes omitted)).

[95] For this reason, immutability would strengthen the significance of *Romer v. Evans*, 517 U.S. 620 (1996), which has been criticized as relatively empty for protecting only the status of being lesbian or gay "without protecting any content the life attached to that name may have." Todd Hughes, *Making* Romer *Work*, 33 CAL. W. L. REV. 169, 173 (1997).

[96] ELY, *supra* note 2, at 150. The more substantial part of the answer is discussed *infra* pp. 635-38.

ganizations and relationships of which we are a part.[97] I certainly do not regard my position that it is ordinarily immoral and unjust to disadvantage someone on the basis of an immutable characteristic as somehow based in natural law. Nor do I claim that it must be true across all legal and social systems.

My claim is more limited than that: It is about the morality and justice of such distinctions in the Anglo-American legal system. The point, as Hume recognized, is that despite the society-specific character of values, we can continue to reason about justice, and that "a view of [justice must be] constructed by the community."[98] While our consideration of the appropriate legal regime must therefore be culture-specific, it is nevertheless coherent to discuss, in Clair Palley's felicitous phrase, "the prevailing moral convictions forming an *essential part* of the culture of the society in which we live."[99] The moral force of immutability in our culture is both essential and powerful.

Even if we are uncomfortable with a morality-based argument, the reality is that we have little choice in the matter. The debate over the validity of a system of social disadvantaging cannot focus solely on the slice of that system represented by governmental action and hence—in the United States at least—subject to constitutional analysis. The focus must be far wider; any proposed argument must be assessed for its strength in confronting the legitimacy of the whole network of decisions that privilege one group over another.

When seen in this light, the weakness of the "expected relevance" approach is most apparent. Even if I underestimate its power for equal protection clause analysis,[100] it has very little force outside that realm, unless it is combined with a morality-based approach such as that afforded by the argument from immutability. As I wrote elsewhere:

> Since permitting even irrational decisions can be justified out of respect for a private decision maker's autonomy, something beyond a showing that . . . discrimination is irrational is needed . . . .
>
> . . . [I]mmutability is one reason why it is irrational to discriminate . . . [but it also shows] that it is not just irrational, but also wrong, to discriminate against people based upon a characteristic they did not choose and cannot change.[101]

Government acts may successfully be challenged as irrational without more; that is what "rational basis" scrutiny means. But when it comes to private discrimination, irrationality must be paired with something else, something that distinguishes the permissible irra-

---

[97] *See* CLAIRE PALLEY, THE UNITED KINGDOM AND HUMAN RIGHTS 8 (1991) (discussing Hume's argument that "[v]alues . . . depend upon human propensities").

[98] *Id.*

[99] *Id.* at 12 (emphasis added).

[100] *See supra* pp. 664-669 (discussing diminished importance of "expected relevance" in contemporary equal protection analysis).

[101] Marcosson, *supra* note 56, at 176.

tionality (e.g., an employer decides to hire only people with red hair) from the irrationality the society places off-limits (e.g., an employer decides to promote only people who accept Jesus Christ as their personal savior). In the case of religion, that "something" is a societal commitment to free, uncoerced religious belief. But as to many traits, that something can consist of forceful moral argument of the sort immutability provides.[102]

b. *The Experience of Immutability*

Public persuasion requires more than legal, doctrinal argument, and it requires more than carefully mapped lobbying. The minority group's stories of unfairness, of inequality, and of deprivation must be told and understood by the wider culture.[103]

To the extent that members of a subordinated group *experience* their membership as immutable, that experience will comprise part of their story. In my view this is inevitable and desirable.[104] Included in the narrative of the civil rights movement in the 1950s and 1960s was the idea of the intense pain and humiliation associated with being Black in a social structure that made whiteness—a status of course entirely off-limits to people with "one drop" of "black blood"[105]—synonymous with virtue and intelligence.[106] The immutability of the ra-

---

[102] In this respect, my proposal can be located within the ongoing consideration of the role of moral argumentation in civil rights movements. *See, e.g.*, Feldblum, *supra* note 8, at 244 (arguing that "legislative and judicial actions that force gay men, lesbians, and bisexuals to forgo the sexual and emotional gratifications that arise naturally from their sexual orientation run counter to our society's shared sense of morality," and that lesbian and gay rights activists should consider making this argument); Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871, 1934 (1997) (arguing that "there is no consistent (or effective) way . . . of arguing for the need to recognize same-sex marriage without engaging in a discussion of how those types of marriages are normatively valuable").

[103] *See* Marc Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 516-17 (1992) (discussing the use of both inclusive and persuasive storytelling as an important way "to identify and counter pre-understanding about excluded groups"); Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 1051 (1991) (arguing that narratives of excluded groups represent "the struggle 'of [their] memory against [the] forced forgetting' imposed by official abstraction").

[104] *See* Ball, *supra* note 102, at 1936 ("Presumably, most, if not all, of the gays and lesbians who seek societal recognition of same-sex marriage believe, as a personal matter, that their relationships are normatively good (or at least that they are *capable* of having a relationship with someone of the same gender which is normatively good). . . . The removal of the moral brackets prescribed by political liberalism means that these individuals will be able to incorporate their 'internal' views about the goodness of their relationship into their public reasoning.").

[105] *See supra* pp. 654-56.

[106] *See* Brown v. Bd. of Educ., 347 U.S. 483, 494-95 & n.11 (1954) (relying upon social science data demonstrating that, for Black children, "[t]o separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."); Farley, *supra* note 27, at 467 ("Race, the 20th century's preeminent form of pleasure, promises to be the problem of the 21st century because its many-splendored pleasures are asymmetrical.

cial identity imposed on African-Americans required them to fight for equality not as whites, but as African-Americans.[107] This was part of the impetus for the "Black is Beautiful" and "Black Pride" movements of the 1960s, which attempted to improve the self-image of blacks by embracing blackness as a positive, enriching, or ennobling attribute—a positive mark of blackness. This movement, which focused largely upon changing the characteristics of the black mark, can be viewed not only as an attempt to instill black pride, but also as an attempt to convince whites, as well as blacks, that the negative characteristics which they associate with blackness are erroneous.[108]

This leaves us with a dilemma. If immutability constitutes an argument of uncertain merit in constitutional terms, but has a moral force and captures the experience of the members of the group, how should it be deployed? My answer is that consistency in story is crucial. It would be worse to leave out an important component of a group's "social" narrative when it speaks to judges (who, after all, will have heard that narrative in their capacity as citizens) than it would be to include that point in legal arguments, even if it were true that careful analysis would demonstrate its infirmity as a purely legal matter. Thus, immutability should be included in litigation as part of the foundation of a group's identity, if and when immutability is an important aspect of the self-presentation made by the group to the broader culture.[109]

Professor Halley suggests that the multi-forum dimension of civil rights movements can be handled by relying on the immutability argument in personal discourse, while omitting it from litigation.[110] Her division between personal discourse and courtroom strategy, however, creates a deep and ultimately fatal strategic tension: It assumes that judges decide cases based solely and narrowly on the arguments the litigants choose to make in court, rather than using the additional knowledge and insights they bring with them into the

---

Race is an unadulterated form of pleasure for whites only. For blacks, it is a form of humiliation.").

[107] *See* Rush, *supra* note 30, at 97 (observing that during civil rights movement, "Black Americans revolted and started demanding respect as Black Americans," even if they could successfully "pass" as white); Hickman, *supra* note 27, at 1167 (relating experience of a Black attorney who fought enforcement of a restrictive racial covenant by challenging its constitutionality, but "would not deny his identity; he would not claim that his light skin made him any less of a Negro—even if it cost him his home").

[108] Alex M. Johnson, Jr., *Destabilizing Racial Classifications Based on Insights Gleaned from Trademark Law*, 84 CAL. L. REV. 887, 926 (1996).

[109] This self-presentation can be seen as a function of the social construction of the category sexual orientation. Since sexual orientation is constructed so that the members of each classification often perceive their classification as heterosexual, homosexual, etc., as immutable, the members will—to the extent they are given the opportunity—present to the greater community autobiographies containing an immutability component.

[110] Halley, *supra* note 2, at 567 ("[T]he argument becomes burdened with an ethical problem it does not have when used privately: When pro-gay advocates use the argument from immutability before a court on behalf of gay men, lesbians, and bisexuals, they misrepresent us.").

courtroom. Judges who have heard the private discourse of immutability Halley describes will expect to hear consistent themes being sounded in court. Litigants adopting a contrary strategy will be met with skepticism if not disbelief, undermining the strength of their cases.

A separate problem arises, however, when the group is not homogeneous. The immutability claim is justified in great part by the way in which individuals experience a characteristic.[111] But within some groups, that experience will vary, effectively creating sub-groups. Indeed, it is arguable that all characteristics divide in this fashion—i.e., that individuals who ostensibly have the same trait in fact experience it differently. This is obviously the case with religion, in which, for example, people who identify themselves as Jewish have radically differing notions of what that means, even to the point where some deny the claims of others to a Jewish identity.[112] Somewhat more subtly, it is also the case with race, as to which racial groups divide into sub-groups marked by often-bitter divisions over what it means to be "really" Black[113] or "loyal" to the "white race."[114]

One axis along which the group can divide is that some experience the characteristic as immutable and include that experience in the story they tell, while others experience it as mutable and volitional. Such a group is faced with a kind of dissonance and with the risk of transmitting incoherent and ineffective messages.

But that is not the only risk brought about by the divergence of experience within the group. Perhaps more dangerous is the splintering that can be occasioned by the decision either to argue or not

---

[111] *See infra* pp. 633-38 (arguing that when a classification within a socially constructed category is experienced as immutable, it indicates a system of oppression of a disadvantaged group).

[112] *See* Daniel Klein, *Examining Israeli Pluralism*, CHIC. MAROON, Jan. 31, 1998, http://www.chicagomaroon.com/articles/a880486523.shtm (last visited Aug. 25, 1999) (report on meeting of the General Assembly of the Council of Jewish Federations, at which leaders debated over "the struggle between the rigorously orthodox and non-orthodox movements in Israel over legitimacy of non-orthodox conversions").

[113] *See* Clarence Thomas, *Civility: A Speech Delivered by Associate Justice Clarence Thomas to Students at Washington & Lee University School of Law*, 4 RACE & ETHNIC ANCESTRY L. J. 1, 4 (1998) (arguing that during the 1980s, conservative Blacks were "called 'Uncle Tom's,' 'sell-out's,' and a myriad of other names"); Leonard M. Baynes, *Who is Black Enough For You? An Analysis of Northwestern University Law School's Struggle Over Minority Faculty Hiring*, 2 MICH. J. RACE & L. 205, 205-12 (1997) (discussing controversy over hiring decision because of questions over the racial identity of candidate, including opposition by minority students who felt she was not "black enough" to be deemed a "minority candidate"); DAVID K. SHIPLER, A COUNTRY OF STRANGERS: BLACKS AND WHITES IN AMERICA 115-16, 242-54 (1997) (discussing concerns among African-Americans about interracial dating and friendships as "disloyal" or reflecting a child "pretending you're something you're not," as well as divisions among African-Americans between lighter and darker-skinned subgroups).

[114] *See* John Scott & Catherine Crier, *Bombs and Hatred*, FoxFiles, Apr. 22, 1999, 1999 WL 18490884 (interview with Neo-Nazi Davis Hawke, responding to question about white Christians—including his mother—marrying Jews by stating, "that's race treason. I would send any race traitor basically to a certain camp designed for race traitors, a camp of elimination. White race traitors have got to be eliminated because they are traitors.").

argue from the immutability experienced only by some members of the community. Those whose experience differs may feel unrepresented by the argument, and fear that any transformation in legal rules will "leave them behind." This seems a rational fear; if the law changes in response to immutability, courts and legislatures might reasonably limit the new protection to those to whom immutability applies.[115]

And there is yet a third risk of the immutability argument when made on behalf of a "divided" community: It spreads a false message of homogeneity, which in turn limits the transformative power of the argument. To the extent that immutability is the basis upon which equal rights are accorded, it becomes a normative template, fostering and reifying inequality as to other characteristics and conditions that are not immutable. Professor Kenji Yoshino has noted the assimilationist quality of this problem,[116] but there is also a "ceiling" problem. Any condition imposed as a prerequisite of equality automatically becomes a hurdle for future civil rights movements to clear.[117]

These three hazards—ineffectiveness, divisiveness, and restrictiveness of transformative potential—are not, however, adequate reasons to abandon immutability. As I will discuss in Part IV with respect to sexual orientation, there is a way to frame the immutability argument so that it is effective, does not leave behind some members of the community of sexual and gender minorities, and retains the full power of progressive argument to achieve equality while also transforming the institutions into which previously excluded groups gain entry.

III. CONSTRUCTIVE IMMUTABILITY: STEPPING BEYOND ESSENTIALISM

It is not enough, of course, to conclude that it would be a good idea to adopt and advance an argument from immutability. There must also be a good argument to make. Here, of course, the problem is that the immutability claim has been subject to the harsh critique

---

[115] *See* Halley, *supra* note 2, at 528 ("Immutability offers no theoretical foundation for legal protection of those gay men and lesbians who experience their sexual orientation as contingent, mutable, chosen.").

[116] *See* Yoshino, *supra* note 2, at 502 (because immutability "withholds protection from groups that can convert, [it] leav[es] them susceptible to legislation that pressures them to do so").

[117] There is a distinct issue regarding the transformative power of civil rights discourse, focusing on whether subordinated groups should seek equality within institutions, or instead attempt either to transform or subvert those institutions. The highest-profile instance of this dispute has been the debate over same-sex marriage within the LGBT community, a campaign some have opposed as simply reinforcing the patriarchal and oppressive institution of marriage. *See, e.g.*, Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage"*, 79 VA. L. REV. 1535 (1993). That particular dispute is, I think, not seriously implicated in the immutability discussion; it has more to do with whether to select equality-based goals in the first place than which arguments should be made once that choice is made.

of social constructionists, who link immutability with essentialism and hence conclude that characteristics that are socially constructed (read: virtually all categories upon which our law distinguishes) cannot be immutable. In this section, I will argue that socially constructed characteristics can be, and often are, immutable. Then, in Part IV, I will consider the application of this new paradigm, which I term constructive immutability, to the case of sexual orientation.

Ely attacked the explanatory force of immutability as a determinant of strict scrutiny. The social constructionists have argued at a more fundamental level that immutability is empirically indefensible—that characteristics upon which government draws distinctions are socially constructed and thus cannot be immutable.[118] This argument linking immutability with essentialism is ill-founded, however, because even a characteristic that is entirely contingent on the social reality constructed in a particular culture at a particular time can be immutable, and can be *experienced by individuals within that culture as immutable.* Understanding this point requires careful consideration of what it means to say that a characteristic is immutable.

To begin with, it is important to distinguish between a category and a classification. As I will use the terms, race is the category; white, African-American, Asian, etc. are the classifications. Sexual orientation is the category; gay, straight, bisexual are the classifications. Citizenship is a category; citizen and non-citizen are classifications. Categories manifest the fact that society is drawing a distinction between people, depending upon the classification assigned to or descriptive of them. For the pure social constructionist, the category exists *only* as a reflection of the significance a culture has assigned to the characteristics that place people in one classification rather than the other.

Constructive immutability posits that even if a category is socially constructed, individual classifications can be immutable. In short, the question is not, "Has this category existed in every time and culture as a description of an essential trait distinguishing some human beings from others?" Rather, the question is, "Do people in *this* time and culture experience their classification as immutable?"[119]

---

[118] *See* Halley, *supra* note 2, at 503.

[119] One might argue that this question is meaningless, since an individual's experience of a characteristic as immutable depends on the presumption that the category itself exists. That is, a lesbian could not really experience being a lesbian as immutable if the categorizing system of which it is a part (sexual orientation) is incoherent. Professor Halley points to the person who perceives not only her own sexual identity as fluid, but sees the whole system of categorizing people as either homosexual, heterosexual, or bisexual as a meaningless labeling process that distorts rather than describes human beings. *See* Halley, *supra* note 2, at 527 (pointing to "strong currents in the pro-gay movements [which] critique the very impulse to organize around gay and lesbian identity, either because doing so suppresses a sexuality distinct and semi-autonomous from *homo*sexuality, or because it obscures the historical, institutional, and political processes that produce identity" (footnotes omitted)). How, she asks in effect, can one be *immutably* gay if one cannot even be gay (or straight or bisexual)?

The second question is the significant one for several reasons. First, the fact that the category is constructed does not tell us whether society has built that construct, at least in part, on top of an existing set of characteristics (making them meaningful by assigning them significance, but not *creating* them), or instead has also constructed the basis for classification. Even if sexual orientation, for instance, is constructed by a cultural imperative to privilege opposite-sex relationships, it remains possible that some of the features that define a person's classification (same-sex or opposite-sex sexual attraction) are not similarly constructed. Certainly, it is possible that an entire system of a category and its underlying classifications are all socially constructed; citizenship is an excellent example. But it is not inherently obvious that this will always be so, and the constructed nature of the category is not conclusive evidence that the classifications are also entirely constructed.

We should be asking the second question for a more profound reason as well. Even if the classifications, like the categories, are socially constructed, that tells us little about the nature of individual experience with classifications. There is no reason to suppose that a culture could not construct classifications so constraining and so powerful that individuals would live their assignment to one classification rather than another as wholly unchosen and unchangeable.[120] Indeed, authors writing about race, gender,[121] sexual orientation,[122] and sexual identity have all identified and described the power with which social norms are imposed. It would be surprising if that power could not shape perceptions so deeply that the reality is, to the individual, immutable. In such a case, the classification would be mutable in the limited sense that a cultural shift could change an individual's classification, but not in the (for our purposes) much more important sense that the classification is within the volitional control of the individual.

This understanding of constructed immutability recognizes that

---

At best, though, this argument merely removes the question one step up in generality. At worst, it is a semantic diversion. Obviously, a heterosexual who experiences his sexual orientation as immutable also perceives the label to be a sufficiently accurate description of his condition that he recognizes the classification (heterosexual) and the category (sexual orientation) as real. Thus, we can ask whether the person experiences her own orientation as immutable, or we can ask whether she experiences the category as real because it describes a distinction between people that she experiences as immutable. Either way, it is ultimately the same question.

[120] *See* Stein, *supra* note 3, at 328 ("To see how it is possible for some property to be both constructed and determined, consider the property of being a peasant. This is surely a paradigmatic example of a socially constructed property, but it might very well be determined that someone has this property and will continue to have it whether or not she likes it....").

[121] *See, e.g.*, NANCY LEVIT, THE GENDER LINE: MEN, WOMEN, AND THE LAW 15-63 (1998) (detailing the "gender separatism" our culture creates from infancy, through which the expectation of conformity to gendered norms is transmitted and enforced).

[122] *See, e.g.*, MARTIN DUBERMAN, CURES: A GAY MAN'S ODYSSEY (1991) (autobiography describing personal history of repeated attempts at psychotherapy seeking a "cure" for the disease of his homosexuality).

an individual's identity is not merely the product of internal (biological, chemical, genetic) characteristics. Instead, the "self" we experience is the product of a hopelessly complex mix of cultural, familial, historical, and internal factors. Crucially, another determinant of true "self" is self-*concept.*

The "concept" we have of something is distinct from the actual thing itself. This is true even about our "actual" self and our concept of self; as Ulric Neisser points out:

> Concepts that refer to real but complex things, like war and Ulric Neisser, rarely do full justice to their referents. I am sure that neither your conception of war nor mine comes even close to comprehending all that happens in actual wars as they occur around the world. . . . The same thing can be said of your concept of Ulric Neisser. More important, the same thing can also be said of *my* concept of Ulric Neisser. Self-concepts never do full justice to the self.[123]

As Neisser explains, this distinctive thing—the self-concept—opens the door for social context to shape the actual self. We all live and grow in a "specific cultural setting," which provides "the context in which we developed our ideas about human nature in general and about ourselves in particular."[124] And just as social context plays a great part in the development of self-conception, self-conception then affects the actual self.[125]

The precise significance of the social world in shaping individuals' self-concepts, and hence in shaping the individual self, is debated among theorists in cognitive psychology.[126] Professors Robyn Fivush and Janine Buckner, for example, take the view that the very notion

---

[123] Ulric Neisser, *Concepts and Self-Concepts, in* THE CONCEPTUAL SELF IN CONTEXT 3 (Ulric Neisser & David A. Jopling eds., 1997) [hereinafter CONCEPTUAL SELF].

[124] *Id.* at 4.

[125] *Id.* (discussing the two-way causality of the actual self shaping the self-concept and the self-concept shaping the actual self).

[126] In a closely related debate, psychological theory has considered the role that chemical interventions play in defining and altering the self. Discussing the effects of Prozac, Professor David Jopling notes:

> People who have lived for many years with inhibiting but nonpathological character traits . . . not only report feeling better than well on the drug; they also identify wholeheartedly with the new medicated self, and disavow the old premedicated self, which they view as alien. The drug, it is claimed, has enabled them to finally be themselves and to finally know who they really are.

David A. Jopling, *Five Kinds of Self-Ignorance, in* ECOLOGICAL APPROACHES TO COGNITION: ESSAYS IN HONOR OF ULRIC NEISSER 313, 325 (Eugene Winograd et al. eds., 1999) [hereinafter ECOLOGICAL APPROACHES].

Responding to this "puzzling claim that Prozac has restored people with no clearly discernible diagnosable psychological disorders to some original state—that it is a neuro-chemical short-cut to the real self," Dr. Jopling pointed out that "if there is such a state as pharmacologically boosted insight, then there must also be such states as pharmacologically induced self-deception and self-ignorance." *Id.* at 325-26. This point about one specific kind of cultural influence on the self can, of course, be broadened; if we should not assume that the Prozac-induced conception of self is the actual self, neither can we assume the accuracy of the religion-induced self, or the parent-induced self. That is, we can never be certain that our self-concept, however produced, is our "true" self.

of self-understanding as affected by cultural context understates the importance of context: "the very core of self-understanding is constructed through, and reflects on, social interactions. Rather than understanding the self *in* cultural context or situating the self *in* interpersonal space, we argue for understanding the self *as* a social-cultural process."[127] While others see the role of cultural context in the development of self-cognition somewhat less dramatically, there is widespread acceptance of the premise that concepts of self are culture-dependent.[128]

These theories suggest that an individual's culture plays an important role in the strength and type of self-concept she develops.[129] Some cultural patterns may tend to "construct the person as a [relatively] independent, autonomous entity," while others are more apt to "construct the person as an interdependent part of a larger social order."[130] Variation across cultures in the way the individual self is situated in relation to the society is one dimension of the impact culture has on self-concept. But it is not the only dimension. It is not difficult to take the additional step of finding a substantive component to the dynamic. That is, if a child's relationships (with parents, siblings, and others) and experiences (environments, exposure to different types of stimuli) affect the strength of her ability to distinguish "me" from "not-me," and the way she perceives the relationship between those two spheres, those factors also affect the attributes (psychological versus physical, for example) she identifies as constituting "me."[131]

Moreover, those relational and experiential factors can and do serve social purposes other than the very general goal of developing self-awareness itself. Cultures do not want children simply to be aware of who they are, as distinguished from the rest of the world. They want them to possess and be aware of *certain specific attributes.* Indeed, this process represents "[o]ne of the powerful ways in which

---

[127] Robyn Fivush & Janine Buckner, *The Self as Socially Constructed: A Commentary, in* CONCEPTUAL SELF, *supra* note 123, at 176.

[128] *See, e.g.*, Daniel Hart & Suzanne Fegley, *Children's Self-Awareness and Self-Understanding in Cultural Context, in* CONCEPTUAL SELF, *supra* note 123, at 128, 131-42 (arguing that while some "types of self-awareness and self-concept . . . are universal and likely to be found in every culture," there are exceptions supporting "a broader framework of how the facets of self . . . might be influenced by particular vehicles of culture").

[129] *See* Kenneth J. Gergen, *The Social Construction of Self-Knowledge, in* SELF AND IDENTITY 372, 375 (Daniel Kolak & Raymond Martin eds., 1991) ("If the social environment continues to define a given individual in a specified manner, we may reasonably anticipate that, without countervening information, the individual will come to accept the publicly provided definition as his own.").

[130] Hazel Rose Markus et al., *Selfways: Diversity in Modes of Cultural Participation, in* CONCEPTUAL SELF, *supra* note 123, at 13.

[131] *See* John F. Kihlstrom et al., *Situating the Self in Interpersonal Space, in* CONCEPTUAL SELF, *supra* note 123, at 154 ("Although self-knowledge is generally concerned with the individual's psychosocial attributes, . . . it should be clear that it also includes the person's physical characteristics.").

cultural systems come to influence individual behavior . . . ."[152] Professors Markus, Mullally and Kitayama express this as a part of "self-ways," which is their term for "characteristic patterns of sociocultural participation," including "ways of thinking, feeling, wanting, and doing."[153] These patterns do not occur randomly or haphazardly; rather, they are the product of "key cultural ideas and values, including understandings of what a person is, as well as senses of how to be a 'good,' 'appropriate,' or 'moral' person."[154]

To the extent that an attribute is perceived within the relevant culture as negative, it is far less likely to be included in individual self-concepts.[155] While it surely is unsurprising that test subjects would report more positive than negative attributes in their self-concept, this result reveals something more than the obvious idea that people tend to describe as positive the attributes they themselves possess. More fundamentally, it tells us that the broad cultural decision to classify a characteristic as "positive" or "negative" has immense impact on the attributes that individuals in that culture will perceive in themselves. This, in turn, helps to shape and transform the actual self.

In short, cognition—particularly of the self in relation to the external world—is constructive of identity. The external world makes a deep contribution to the developing self early in life, transmitting expectations and understandings that become integrated into the self. And just as cognition is constructive, "remembering is reconstructive."[156] Thus, the same phenomenon of cultural influence on the self is also at work in memory. An individual's memory is not merely "the registering, maintenance, and retrieval of internalized states."[157] Rather, just as cognition is "a process in which the individual self encounters . . . other individuals in that environment," memory is the process by which "we not only encounter the past environment, but . . . we keep in contact with our past selves in their surroundings."[158] At the same time we integrate our past selves and experiences via memory, we also project this integrated self/selves outward; memory serves the important purpose of "establishing and sustaining a particular identity *within relationships.*"[159] Indeed, "memo-

---

[152] Markus et al., *supra* note 130, at 13.

[153] *Id.* at 16.

[154] *Id.*

[155] *See id.* at 23 (reporting on study suggesting "that the self-concepts of Americans contain about four to five times as many positive attributes as negative ones") (citing A.R. Herzog et al., *Sociocultural Variation in the American Self*, Paper Presented at the Meeting of the Gerontological Society of America (1994)).

[156] William Hirst & David Gluck, *Revisiting John Dean's Memory*, *in* ECOLOGICAL APPROACHES, *supra* note 126, at 253, 255 (discussing how memory acts in a self-serving fashion).

[157] Edward S. Reed, *Perception is to Self as Memory is to Selves*, *in* THE REMEMBERING SELF: CONSTRUCTION AND ACCURACY IN THE SELF-NARRATIVE 278 (Ulric Neisser & Robyn Fivush eds., 1994) [hereinafter THE REMEMBERING SELF].

[158] *Id.* (citation omitted).

[159] Kenneth J. Gergen, *Mind, Text, and Society: Self-Memory in Social Context*, *in* THE

ries and forgettings operate as means of establishing oneself in a relationship as a particular kind of person, with particular privileges and duties."[140] Thus, just as the concept of who we are is shaped by cultural forces and social interactions, so too is our memory of who we have been. That memory in turn contributes both to the perception of who we become tomorrow and to the actual person who exists tomorrow. In both the realms of cognitive construction of the self and memory-based reconstruction, social context has a profound effect in shaping the individual self, up to and including creating characteristics lived as immutable.

Finally, we should ask how individuals experience their classifications for another reason as well, one that goes to the core of what it means for a category to be socially constructed. Post-modern scholars posit that a category exists because of the social and legal significance assigned to it. Citizenship is an archetypal example of this, as a simple comparison demonstrates. In the example with which I began this article, Janet Jones and Steve Smith were distinguishable because Smith was born in Juarez, Mexico, while Jones was born in El Paso, Texas, making Smith a Mexican citizen,[141] and Jones a United States citizen. If there were no social or legal significance attached to the difference between Smith and Jones then the category "citizenship" would not exist. Since the distinction does make a difference, the category exists, as do the classifications of citizenship that constitute it.

The primary social purpose of many categories is to privilege one classification over another (or to create a hierarchy among multiple classifications).[142] Hence, the existence of the category often entails the creation of a disadvantaged "other."[143] Such categories give rise to

---

REMEMBERING SELF, *supra* note 137, at 78, 97 (emphasis added).

[140] *Id.* (citing J. Coulter, *Two Concepts of the Mental, in* THE SOCIAL CONSTRUCTION OF THE PERSON (K.J. Gergen & K.E. Davis eds., 1985)).

[141] Assuming that, apart from place of birth, Smith possesses no qualities for citizenship in a country other than Mexico. *See* 8 U.S.C. § 1427 (1994) (enumerating requirements for becoming a naturalized United States citizen).

[142] *See* Yackle, *supra* note 88, at 857 ("By defining that which is deviant, the dominant forces in society define as well that which is oppositional to deviance, namely the norm, and appropriate that norm as a circular justification for dominance.").

[143] Not every category creates, defines, and maintains the status of the privileged group. Major league baseball players, for instance, are classified either as "American League" or "National League" players for purposes of organizing the teams and scheduling the competition; neither group of players enjoys superordinated status. However, in many instances, even a category system created for reasons unrelated to group privilege end up producing subordinated and superordinated classifications. Imagine a culture in which two functions must be performed: gathering food and preparing it for consumption. In year one, all citizens perform both functions, and the groups "gatherers" and "preparers" would not exist. In year two, the people come to learn that the functions will be performed better, and everyone will be better off, if the tasks are divided—the magic of specialization. For this functional reason, the category "food producer" comes into being, with two classifications: gatherer and preparer. Though this social system was created for reasons unrelated to the privileging of either group, they will ultimately vie for status and one will emerge as the privileged group, with membership require-

privilege, either by directly assigning benefits or burdens on the basis of classifications, or indirectly by permitting those in the relatively privileged classification to identify themselves as distinct from the less-worthy "others."[144]

In this context, gender role deviation is a more helpful illustration than citizenship. The labels "masculine" and "feminine" are entirely social constructs, hopelessly bound up with gendered expectations and norms, the product of cultural forces.[145] Given this meaning, some traits or roles might be (and often are) masculine in one culture and feminine in another.[146] Traits a given culture ascribes as predominately male and roles assigned predominately to men are "masculine," simply by virtue of the society's own social structure; while those traits and roles ascribed and assigned predominately to women are "feminine." The otherness faced by people who do not meet *our* gendered expectations—the fate dealt to women like Ann Hopkins[147] and men like "Andy Hopkins"[148]—is part of the process by which *our* culture defines and reinforces the meaning of being a "woman" and a "man."[149]

Notwithstanding this recognition of the construction of gender, however, the essentialist is right that women like Ann Hopkins exist in every culture and in every era. There will be women who, relative to other people (men and women), are unwilling or unable to master and perform certain roles that, *in our culture*, are seen as "feminine." Cultural norms alter the ways and extent to which such individuals manifest their inherent traits in outward behavior,[150] but not the exis-

---

ments marking it off as "elite" and benefits by which it marks itself off as worthier. Thus, categorization may not always emerge from the desire to privilege, but the two are linked, almost inevitably, at least in any set of circumstances that could even imaginably lead to an equal protection dispute.

[144] *See* Samuel A. Marcosson, Romer *and the Limits of Legitimacy: Stripping Opponents of Gay and Lesbian Rights of Their "First Line of Defense" in the Same-Sex Marriage Fight*, 24 J. CONTEMP. L. 217, 244-50 (1998) (discussing exclusion from status-conferring institutions as a key element of discrimination against women and racial minorities).

[145] *See* LEVIT, *supra* note 121, at 204-05 (discussing conceptions of masculinity and femininity, and the wide array of cultural forces that produce them).

[146] *Id.* at 187-88 (noting non-gendered nature of roles in several Asian and Native American cultures, and examples of roles performed by women that are "gendered male" in our culture).

[147] *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (plaintiff denied partnership in accounting firm, at least in part because of perception that she was too "macho," and was advised to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry").

[148] *See* Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037, 1100-1103 (1996). "Andy Hopkins" is the mythical mirror-image of the plaintiff in *Price Waterhouse*, a man deemed too effeminate to fit male stereotypes and perform well in traditionally male jobs. Just as with the real Ann Hopkins, Andy's characteristics are his own; the gendered implications that lead him to be perceived as "un-male" are social constructs.

[149] Professor Levit reminds us that men who do not conform to gender expectations are, like Ann Hopkins, victims of our policy of policing the "gender line." *See* LEVIT, *supra* note 121, at 13 (assuming the task of "demonstrating some of the ways conventional gender roles harm men").

[150] If gender lines are enforced by the criminal law, for instance, gender non-conformists will

tence of such people. In another culture, "Hopkinsness" may reflect traits or roles more typically expected of women, while in a third the attributes may not be gendered at all. In those cultures, Ann Hopkins will not be a "gender outcast." She would not be part of the "other" whom the law and other normalizing institutions identify in making the category of gender meaningful.

Crucially, though, *some other people will be.* The presence of deviance from assigned gender categories is timeless—and, it appears, almost an essential feature of social organization. In *all* cultures, men and women exist who depart to a significant degree from their own society's constructions of masculinity and femininity and who experience this departure as an immutable feature of their self-conception. The experience of otherness itself is essential in the sense that it exists across time and culture as the inevitable product of social organization.

This may seem a bleak way of looking at the social organization of gender relations. I dismiss the possibility of an ungendered culture, in which neither maleness nor femaleness is accompanied by gendered expectations. These expectations, in turn, produce an inevitable "cultural other," who experience their own condition as deviating from the expectations. Worse still, it is inherent in the notion of gendered expectations that this "deviating other" will fall prey to social disadvantaging aimed at inducing or coercing conformity. Without this pressure, the expectations are meaningless.

Of course, the mere fact that "otherness" is an inevitable, essential characteristic of social organization does not mean that any particular individual's experience as being a part of the other is immutable. But that is precisely the point: The simple fact that a category is socially constructed does not tell us, one way or the other, whether an attribute and its resulting social classification is immutable. The answer to that question requires examination of the classification and the individuals within it.

The possibility of immutable classifications within a socially constructed category is not merely theoretical. Citizenship illustrates as much. Our earlier pair, Smith (the Mexican citizen born in Juarez) and Jones (the American citizen born in El Paso), are again illustrative. If they had been born in precisely the same locations in 1825, Smith and Jones would both have been Mexican citizens. And if they had been born in 1836, Jones's citizenship would have been hotly disputed, Texas having declared independence in 1835 but Mexico not having recognized the validity of that act.

Plainly, citizenship/alienage are social constructs—an imposition

---

be less likely to display their non-conformity openly, instead doing so in more subtle and private ways. *See* Marcosson, *supra* note 56, at 181 (noting that "people hide being gay to avoid discrimination," but rejecting argument that "because repression alters behavior" the characteristic cannot be immutable).

of political, social, historical, legal, and economic forces on geography.[151] There is nothing biologically inherent in Smith and Jones that either divides or unites them; it has merely been changes in the law's treatment of the geography of their birth that has created or abolished any distinction between them.

Since the category of citizenship—as well as the classifications of citizen and non-citizen—are social constructs, they would not be regarded as immutable by the pure social constructionist. That conclusion, however, is relatively meaningless. Our real focus should be on Smith and Jones. Whether Smith's status as a non-citizen in the United States is immutable depends not on the simple fact that citizenship is a social construct, but on the nature of the category and the definitions and characteristics that serve to place him in the non-citizen classification.

What does inquiry into Smith's classification reveal? Well, non-citizenship is partially mutable. Someone arguing against the immutability of citizenship would point out that Smith may be entitled to seek naturalization, and for this reason may change her status as a non-U.S. citizen.[152] This does not, however, establish the mutability of citizenship for all purposes.[153] Part of the socially constructed distinction between citizens and non-citizens is this: Even if she becomes naturalized and is otherwise qualified, Smith will forever be ineligible to run for President.[154] Jones faces no such prohibition.

Smith experiences her disqualification from serving as President of the United States as immutable. Having been born on one side of a socially constructed line dividing two socially constructed political units, she is immutably disqualified. For her, the easy demonstration of the constructed nature of the category does not change the reality of this immutability.

One answer might be to challenge the premise that a classification can be immutable even when the category is socially constructed. In the context of citizenship and the presidency, the definitions of "citizen" and "president" are socially constructed and subject to alteration. In that sense, Smith's ineligibility for the presidency is mutable; all we need to do is reconceive our notion of the office and/or of citizenship to no longer include natural-born citizenship as a defin-

---

[151] It is beyond the scope of this article, but surely not unrelated to my point, that the construct of citizenship is deeply entangled with the constructs of race and ethnicity. *See* Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 OR. L. REV. 261, 270 (1997) (noting that every potential route to U.S. citizenship was, at least initially, "restricted by race").

[152] *See* 8 U.S.C. § 1427 (1994).

[153] It might not establish mutability for any purposes, if we accept that some traits that are technically mutable could be deemed immutable because it is so difficult, burdensome, or unfair to actually change them, or because the mutability is not entirely within the control of the individual, as is the case with a person seeking U.S. citizenship.

[154] U.S. CONST. art. II, § 1 ("No person except a natural born Citizen . . . shall be eligible to the Office of President . . . .").

ing criterion.[155]

That answer, however, is not ultimately persuasive. Constructive immutability retains its power, because we must assess the mutability question from the point of view of the members of the group rather than at the level at which the category is socially constructed.[156] The crucial attribute of immutability for legal and political purposes is that the trait is not subject to the individual's voluntary, relatively uncomplicated decision to change her classification. Recall the context in which we are considering the immutability argument: an equal protection lawsuit. Ponder this dialog:

> *Smith*: Judge, declare this law disqualifying me from the presidency unconstitutional. It is a violation of equal protection because (in part) my status as a naturalized citizen is immutable.
>
> *Government*: Leave the law alone, your Honor. Her status is mutable. It can be changed simply if the socially constructed definition of the presidency changes. If the category is mutable, Smith's classification cannot be immutable.
>
> *Smith*: Wait a second. The government is telling you that my status is mutable because it can be changed by a shift in the law, which it then says is a reason not to change the law? And anyway, I can't change the definition of the presidency. It may be mutable in the hands of millions of people, but not in mine. And *my status as a naturalized citizen cannot be changed.*

---

[155] For instance, we might do away with the distinction between naturalized and native-born citizens, either in general or with respect to the presidency in particular.

[156] The social construction of race vividly illustrates this point. At one level, Anthony Appiah argued that W.E.B. DuBois's racial identification was subject to his control and choice. *See* ANTHONY APPIAH, IN MY FATHER'S HOUSE 45 (1992) (arguing DuBois' own reasoning should have led him to escape not only "the reality of American racism," but also the concept of race itself); Anthony Appiah, *The Uncompleted Argument: DuBois and the Illusion of Race*, *in* "RACE," WRITING, AND DIFFERENCE 21, 22 (Henry Louis Gates, Jr. ed., 1986) (discussing how DuBois came to see race as "unbiological"); *see also* Jayne Chong-Soon Lee, *Navigating the Topology of Race*, 46 STAN. L. REV. 747, 765 (1994) (concurring with Appiah's analysis). But Christine Hickman convincingly demonstrates that this "choice" was not his. *See* Hickman, *supra* note 27, at 1244-49. Although his racial identity was constructed, DuBois neither constructed it nor held the power to de- or re-construct it. The definition of race—rigidly tied to "one drop" of Negro blood—was outside his control in the sense that the law and social institutions would treat him as Black regardless of his own self-definition. Nor has this changed as much as some might suppose; numerous scholars have described their sense of having their perceived racial identity not correspond to their own self-identification, or of the unfairness of rigid categories that deny an individual's right to her own multiracial identity. *See* Gilanshah, *supra* note 31, at 197 ("[F]or the multiracial movement, failure of the government to include a multiracial category would result in cultural genocide."); Julie C. Lythcott-Haims, Note, *Where Do Mixed Babies Belong?: Racial Classification in America and Its Implications for Transracial Adoption*, 29 HARV. C.R.-C.L. L. REV. 531, 542 (1994) ("Any person claiming to be Black, or White, or Multiracial, should be permitted to so classify herself. Although government agencies, social scientists and the law all make use of racial classification for seemingly legitimate reasons, these entities have no right to tell a person how to classify herself. The act of racial identification is personal; it is no one else's business."). The culture has retained significant control over racial identification and has kept racial identity substantially immutable at the individual level. *See also supra* pp. 654-56.

Even if the category is socially constructed, the classification can be immutable.[157]

Thus, it is clear that opponents of immutability cannot rely on the claim that since the category is socially constructed, an individual's classification cannot be immutable. Immutability exists at the relevant level of inquiry: the experience of those within the classification. This argument is of considerable relevance to the sexual orientation debate.

IV. SEXUALITY AS CONSTRUCTIVELY IMMUTABLE

Sexual orientation is the prototypical instance of a socially constructed category as to which an individual's classification may be immutable. The category itself is socially constructed, imbued with significance by means of legal and social distinctions created in order to privilege one classification over others, and by the self-definition of the members of the subordinated "other." But the attributes that place each individual into one of the classifications are often immutable, and—perhaps more crucially—the category as socially constructed in our culture produces that experience. For each of these reasons, a person's classification within the sexual orientation category must be treated as immutable by the law. In this section, I will first explain the constructed nature of sexual orientation,[158] and then turn my attention to the immutability of this socially constructed category.

---

[157] This point can be reinforced by another category: disability. Recall that Dean Ely used disability as a paradigmatic case of an immutable characteristic, to which the Supreme Court has applied only the lowest level of equal protection scrutiny. *See supra* pp. 658-60. But status as either disabled or not, like citizenship, is to a significant extent socially constructed by legal definitions. In *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999), the Court considered whether an employer could rely on Department of Transportation ("DOT") safety regulations to deny a job to a trucker with monocular vision, even though he had been certified for the position by the DOT under a waiver program. *Id.* at 555-56. Kirkingburg's status as "disabled" or not was not a function of his intrinsic condition, nor was it subject to his control. Instead, it was controlled by the DOT regulations (which seemed to treat him as disabled) and the waiver program (which seemed to treat him as not disabled in a way relevant to job performance). By permitting the company to rely on the safety standard without further justification, despite the waiver, the Supreme Court constructed disability to include Kirkingburg—reinforcing the basic point that socially constructed categories can produce immutable classifications.

[158] As I will explain in greater detail in Part B of this section, I am, for purposes of this argument, an agnostic on the question of whether sexual orientation truly is constructed. Or, more accurately, my view is that whether it is constructed depends on what that term means. The category plainly exists *in part* because of the social significance we attribute to it. If that social significance were altered, the category would be altered along with it. But that does not entail the conclusion that the category is *entirely* constructed. When the constructionist says that social construction is the attribution of social significance, the attribution can be to a physical trait that is not itself constructed—blood type, for instance. Or it may involve attributing significance to a socially created trait, such as religion. Thus, the question on which I am agnostic is whether the social construction of sexual orientation involves the attribution of significance to a pre-existing reality, to a socially created distinction, or to a trait that is some of both.

A. *The Construction of Sexual Orientation*

Ironically, one of the most persuasive arguments helping to establish that sexual orientation is a modern, constructed category has been offered on behalf of the seemingly contrary claim that same-sex sexual attraction pre-dates the supposedly "modern" category of homosexuality. Wayne Dynes argued:

> A curious outcome of these centuries of oppression is that when the first writings on homosexuality reached the general public at the end of the nineteenth century, some individuals revealed to psychiatrists that, although they had responded solely to members of their own sex since adolescence, *until then they imagined themselves unique in the whole world.* They had "constructed" their own sexual consciousness without any social input—a feat that should be impossible according to social constructionist postulates.[159]

Dynes's observation perfectly captures the distinction between the category and the attributes that place people in one classification or the other. The testimony he describes is powerful evidence that people experienced same-sex attraction long before social construction theory claims "homosexuality" came into being. At the same time, Dynes fails to appreciate the significance of the isolation these people also described. The isolation occurred precisely because there was no understood, culturally identified category into which they could situate themselves.[160] They required no social inputs to perceive their attraction to others of their own sex, but much more was required for them to perceive themselves as something other than individuals in this respect. A category had to come into being. In other words, there is no conflict between the proposition, "Sexual orientation is a twentieth century, socially constructed category," and the statement, "People experienced same-sex attraction long before the twentieth century."

The essentialist answers, however, that the isolation experienced by people with same-sex attraction was not complete. To the con-

---

[159] THE ENCYCLOPEDIA OF HOMOSEXUALITY 1209 (Wayne R. Dynes ed., 1990) (emphasis added).

[160] That is why the same phenomenon of perceived uniqueness is heard in the autobiographies of twentieth century gay men and lesbians as well. Throughout most of this century, two of the characteristics of the homosexual classification have been its relative invisibility, *see* ALLAN BÉRUBÉ, COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO 271 (1990) (pre-World War II generations "had invented the closet—a system of lies, denials, disguises, and double entendres—that had enabled them to express some of their homosexuality by pretending it didn't exist and hiding it from view"), and its unmentionability. *See* Yoshino, *supra* note 2, at 556 (noting the cultural force that required homosexuality to remain the "sin that dared not speak its name"). These qualities preserved the feature noted by Dynes—the isolation of the person who comes to identify him or herself as gay—well into this century. In other words, the creation of the category did not automatically or immediately produce the sort of "social inputs" that would dissipate the sense of uniqueness.

trary, the historical record contains same-sex relationships—an obvious, fortunate departure from self-denial and detachment.[161] These examples, however, do not constitute the creation of a social category,[162] which requires far more than simply the identification of people with a particular attribute, and more even than a record of people with identifiable life patterns and relationships. It requires differentiation of that group from the dominant culture, a process often triggered by the need felt by the superordinated group to set itself apart and thus above.

Thus, it is not enough to point out that there have always been people whose primary sexual attraction is to members of the opposite sex.[163] Of course there have been, and to that extent, heterosexuality is essential. However, the existence of heterosexuals has not always been accompanied by a socially created category by which they have been designated as the privileged classification. As a result, just as being like Ann Hopkins in one culture may not be part of the construction of gender, opposite-sex sexual attraction in another culture may not reflect the social construction of sexual orientation.[164]

The attribute of same-sex attraction predates the formation of the category "sexual orientation," yet society has come to recognize individuals as having an "orientation" and form an entire social structure around that perception, only in the last 150 years.[165] In fact, the category could not have formed previously, primarily because Western culture was so adept—even expert—at repressing the expression of the ever-present same-sex attraction and at preventing social organi-

---

[161] *See* RICTOR NORTON, THE MYTH OF THE MODERN HOMOSEXUAL 216-21 (1997) (providing "lists" of pre-modern homosexuals, including numerous couples).

[162] It is important here to stress that we are attempting to identify the sources and nature of group-based oppression. After all, this article is attempting to identify powerful arguments to be used in legal and social discourse for challenging such oppression. Thus, it is relatively unimportant that we can locate people within pre-industrial societies whom we can accurately describe as homosexual, or even pairs and wider groups of such people. In fact, it ultimately matters little whether *a* category of sexuality existed before construction of *the* category with which we are concerned. We are instead concerned with the category of sexual orientation that exists in our culture. This category is a social construct, understandable only with reference to contemporary social context.

[163] *See* NORTON, *supra* note 161, at 12 ("[T]here is a core of queer desire that is transcultural, transnational, and transhistorical, a queer essence that is innate, congenital, constitutional, stable or fixed in its basic pattern.").

[164] My use of heterosexuality in this paragraph is intentional. In the endless discussion regarding whether sexual orientation is immutable, the focus is invariably on homosexuality. This causes us to lose sight of the reality that heterosexuality, too, is a sexual orientation, and that any insight into the construction of the category (sexual orientation) must take account of all the classifications. *Cf.* Robert S. Chang & Jerome McCristal Culp, Jr., *Nothing and Everything: Race,* Romer *and (Gay/Lesbian/Bisexual) Rights*, 6 WM. & MARY BILL RTS. J. 229, 247 (1997) (criticizing the perception that "the majority of the country that sees itself as 'white' does not have a race and therefore is not protected by civil rights legislation").

[165] *See* Robert Padgug, *Sexual Matters: On Conceptualizing Sexuality in History*, *in* FORMS OF DESIRE, *supra* note 3, at 43, 57 & n.28 (relying on works of Jeffrey Weeks, accepting "second half of the nineteenth century" as the period marking "the full emergence of homosexual role and subculture").

zation around the concept of same-sex sexual attraction.

This phenomenon is best illustrated by considering the role of religious institutions. The long decline in the governing authority of religious institutions has been enormously important in the creation of the category of sexual orientation and its classifications. In most of Western society, churches have seen their influence over the law decline in the last several hundred years as secular courts first rivaled and then supplanted ecclesiastical courts,[166] as doctrines of separation of church and state limited the influence of religions,[167] and as monarchies whose rulers based their legitimacy in part on their "divine right" to govern, and hence on the imprimatur of churches, gave way to representative forms of government.[168] In combination, these factors have reduced or eliminated the role of churches in governance in Europe and the United States.

Not unexpectedly, as this has occurred, the ability of religious institutions and actors to control behavior and construct the social reality in which people live has also declined. This decline made room for a relatively greater freedom of individuals to speak about and act on their sexual understandings. The sin that once was unmentionable became mentionable, and then openly discussed and considered, vastly increasing the likelihood that a twentieth-century American who experiences same-sex sexual attraction would, at some point, connect with others rather than believe herself to be isolated and unique. The decline also contributed to the development of immensely important scientific and legal changes, such as contraceptive methods (which continue to be opposed by religious forces[169]), and more freely available divorce. These, in turn, have fundamentally al-

---

[166] *See* Jack Moser, *The Secularization of Equity: Ancient Religious Origins, Feudal Christian Influences, and Medieval Authoritarian Impacts on the Evolution of Legal Equitable Remedies*, 26 CAP. U. L. REV. 483, 514-38 (1997) (discussing decline of ecclesiastical courts in England in the centuries following the introduction of royal courts after the Norman Conquest).

[167] *See* U.S. CONST. amend. I.

[168] *See* Edward J. Conry & Caryn L. Beck-Dudley, *Meta-Jurisprudence: A Paradigm for Legal Studies*, 33 AM. BUS. L. J. 691, 696 (1996) ("When Charles I was killed by Parliament, the persuasive power of the theory of the divine right of kings died also. A part of the pillar of governmental authority was chopped away. With Parliament ruling, historical jurisprudence was ascendant. The perceived right to make law shifted away from God's king to those elected—those who rule by the consent of the governed—to Parliament. So the pillar was shored up with a new source of authority.").

[169] *See* Elof D.B. Johansson, *Comparison of the Availability of Contraceptive Methods in Selected European Countries and the United States*, 23 N.Y.U. REV. L. & SOC. CHANGE 471, 471 (1997) ("Development decisions about contraceptive products are heavily influenced by political and religious beliefs in addition to market and scientific research. The influence of politics and religion with regard to contraceptives manifests itself at all levels of the development process—from generating ideas, to applying for agency approval, to actual marketing efforts—and hampers the development of new contraceptive products."); Brian J. Leslie, Note, *Poland, Abortion, and the Roman Catholic Church*, 17 B.C. INT'L & COMP. L. REV. 453, 468 (1994) (discussing the Catholic Church's support for a total ban on both contraception and abortion in Poland).

tered the institution of marriage and the dynamics of opposite-sex relationships.[170]

Thus, the reconstruction of religion has rendered religious institutions less effective in monitoring and controlling conceptions of sexuality.[171] They have been unable to prevent the social and political interactions through which the modern category of sexual orientation has been created.[172] In that sense, the category came into being as a positive development from the standpoint of sexual minorities: The previously impossible had come to pass.

On the other hand, a central aspect of the creation of the category was the immediate attribution of significance to the classifications, as a result of which they became privileged (heterosexuality) and subordinated (homosexuality). The dominant group was faced with the need to define the classifications if it was to maintain a status hierarchy in which it was at the top.[173] If there was going to be a recognized, defined "other," it must plainly be an *unworthy* other. In the process, the dominant group—now identifiable as "heterosexuals"—would also create and define itself. The behavioral norms of acceptable sexuality, which had previously enjoyed the "super-privileged" status of exclusivity, now had to be privileged not by their exclusivity but by actual differentiation from the less-worthy "others."[174] Sexual orientation was an alternative—and progressively less effective[175]—mechanism by which opposite-sex relationships were privileged.[176]

---

[170] *See* Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1845 (1985) ("Abortion, neonatal euthanasia, and homosexuality are but a few more examples of areas in which the changing nature and weight of religious views have helped change legal views and language.").

[171] *See id.* ("[B]ecause religious views are less universally and strongly held, statements of moral aspiration linked to religion have slipped more readily from legal discourse. This change is visible, for example, in the child-custody area, where evidence of concern for the moral welfare of the child—as instanced, for example, by evidence that the parent sends the child to Sunday school—is increasingly thought irrelevant. Because religious views on marital obligations have changed, the move to no-fault divorce was eased, and perhaps even made more necessary. Similarly, because religious views on sexual relations outside of marriage have changed, the law's tolerance, and even encouragement, of such relations has increased . . . ." (footnote omitted)).

[172] *See* Balkin, *supra* note 92, at 2340 (noting that the formation of "status groups" is a "sign that . . . the [pre-existing] social hierarchy has started to become controversial and hence can no longer hide itself under the camouflage of naturalness").

[173] *See id.* at 2333 ("Status hierarchies are kept in place by a system of social meanings and the attribution of positive and negative qualities. When this set of social meanings starts to weaken, so too does the status hierarchy, and new forms of status competition become possible between superordinate and subordinate groups.").

[174] *See id.* at 2335 (discussing the most effective systems of social hierarchy as those in which "social expectations were preserved, social deviance was invisible, [and] overt enforcement of status norms was unnecessary").

[175] The rise of the gay rights movement vividly illustrates the decline in the ability of the classification "homosexual" to stigmatize and, in so doing, to superordinate heterosexuality. Indeed, the rise of the anti-gay movement and the ensuing creation of a "culture war" over homosexuality also shows that the prior rigid status hierarchy which subordinated people with same-sex desires has weakened. *See id.* at 2333-34 (arguing that "movement from relatively taken-for-

The essentialist over-reading of the presence of pre-twentieth century same-sex attraction also ignores the shifting nature of same-sex desire and its social meaning. The oft-discussed distinction between gender and sex spills over into this issue as well; it cannot be said with any reasonable confidence that the same-sex desire of nineteenth century "homosexuals" resembled the desire of gay men and lesbians of today. Was the desire prompted by physiological sex, or some concept of gender that has been radically transformed in the past 150 years? To render a simplistic illustration, the basis for a woman who expressed same-sex desire in 1850 might have been attraction to cer-

---

granted status hierarchies to relatively contestable ones is an important source of cultural struggles," so that "intense social conflict between status groups emerges not at the height of a system of social stratification but during its decline").

[176] Reasonable minds can differ over the relative success the superordinated group has achieved over time in maintaining its privileged status. Cultural forces demonizing sexual and gender minorities have been potent and omnipresent since World War II, a phenomenon linked to the perceived need to reinforce gender norms after women had moved into so many traditionally male professions during the war. *See* LILLIAN FADERMAN, ODD GIRLS AND TWILIGHT LOVERS: A HISTORY OF LESBIAN LIFE IN TWENTIETH-CENTURY AMERICA 119 (1991) (noting that, when women's labor was vital during World War II, "female independence and love between women were understood and undisturbed and even protected," but that after the war, these traits "were suddenly nothing but manifestations of illness"). These have ranged from cinematic portrayals of gay men and lesbians as sick, disturbed, and pathetic, *see* VITO RUSSO, THE CELLULOID CLOSET: HOMOSEXUALITY IN THE MOVIES (1981), to the pre-1973 classification of homosexuality as a mental illness by the psychiatric profession, *see* Jennifer Wriggins, *Maine's "Act to Protect Traditional Marriage and Prohibit Same-Sex Marriages": Questions of Constitutionality Under State and Federal Law*, 50 ME. L. REV. 345, 381 n.254 (1998), to the infamous portrayals of gay men and lesbians in judicial opinions ranging from Chief Justice Burger's concurrence in *Bowers v. Hardwick*, 478 U.S. 186, 196-97 (1986) (finding condemnation of homosexual sodomy "firmly rooted in Judeo-Christian moral and ethical standards," and opining that "[t]o hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching"), to Justice Scalia's comparison of homosexuals to murderers in his dissent in *Romer v. Evans*, 517 U.S. 620, 644 (1996) (arguing that the attitude that "certain conduct [is] reprehensible," including murder, is "the only sort of 'animus' at issue here: moral disapproval of homosexual conduct"). Today, the religious right continues this tradition, characterizing gay men and lesbians as unhealthy, dangerous child molesters, *see* Mary Becker, *The Abuse Excuse and Patriarchal Narratives*, 92 NW. U. L. REV. 1459, 1472 & n.72 (1998) (arguing that "gay men and lesbians continue to be seen as likely abusers of children . . . [i]n part . . . because the anti-gay religious right identifies gay men and lesbians as likely child abusers"). The murders of Allan Schindler, Billy Jack Gaither, and Matthew Shephard demonstrate that anti-gay hatred is hardly a thing of the past.

Nevertheless, compared to the era prior to the rise of the gay rights movement, it is difficult to quarrel with the proposition that forces attempting to reinforce the pre-existing hierarchy in contemporary America have grown gradually less effective. Anti-gay forces have been unable to block repeal of numerous state sodomy laws. They have grown more isolated; the courts have slowly edged away, as symbolized in the Supreme Court's move from *Bowers* to *Romer*, and even politicians who once courted anti-gay voters have shifted the tone, if not the substance of their positions. *See* Katharine Q. Seelye, *Gay Voters Find G.O.P. Newly Receptive to Support*, N.Y. TIMES, Aug. 11, 1999, at A1 (although GOP presidential candidates "have not embraced a broader agenda," the "difference in attitude is striking"). Additionally, in the religious arena, churches have become markedly less monolithic in their opposition to gay and lesbian relationships, with full acceptance in many denominations and ongoing debates in others. Still, in acknowledging that the sweep of history has gradually reduced the authority of churches and other social institutions to enforce anti-gay morality, it is important not to underestimate the contemporary power that remains, and its harmful consequences.

tain gendered traits then more prominently and consistently associated with women. As gender roles have shifted, the substance of same-sex desire has shifted along with them. For this reason, too, the presence of same-sex attraction prior to this century does not disprove the claim that sexual orientation is constructed.

However, that is only part of the story. While the construction has been in part the handiwork of the dominant group establishing itself, and has intersected with transitioning gender roles, it has also been significantly shaped by the emerging "other."[177] This is especially true in the last quarter-century, as the homophile community transformed itself into a more public gay and lesbian civil rights movement, which dealt as much with seeking a new, liberated self-perception as it did with traditional political aims.[178] Subsequently, in a process that continues today, the identity thus forged began to splinter even further as multiple perceptions of queer identity gave birth to a very different social "other."[179]

It is appropriate to pause here to note that this observation greatly lessens the force of the post-modern critique of gay and lesbian identity. The limited claim that there has always been same-sex as well as opposite-sex sexual attraction, in lieu of the more problematic assertion that sexual orientation is timeless, avoids the dilemma of accepting the classification at a time when some queer studies scholars are challenging the very premise of gay and lesbian identity.

My proposal also responds to the related concern that basing legal arguments on the premise of gay, lesbian, or bisexual identity validates a category and classifications created to perform the specific task of identifying the superordinated group's claims to moral and political superiority, and hence to render sexual and gender minorities an unworthy other.[180] This claim has force; a classification imposed on a subordinated group is suspect from the outset. However, that force is abated by the growing participation of LGBT communities in defining ourselves, lending the identities increasing legitimacy

---

[177] *See* Steven Epstein, *Gay Politics, Ethnic Identity: The Limits of Social Constructionism*, *in* FORMS OF DESIRE, *supra* note 3, at 239, 250-51 (describing sexual identity as "a complex developmental outcome, the consequence of an interactive process of social labeling and self-identification"); DENNIS ALTMAN, THE HOMOSEXUALIZATION OF AMERICA, THE AMERICANIZATION OF THE HOMOSEXUAL 1-2 (1982) (noting that "the early activists . . . produced one of the key social changes of the [1970s] . . . the establishment of a new definition of homosexuals").

[178] *See* DENNIS ALTMAN, HOMOSEXUAL: OPPRESSION AND LIBERATION 142-43 (1971) (discussing distinctive characteristics of the early-1970s gay movement).

[179] *See* Halley, *supra* note 2, at 505 ("[R]emarkable changes in identity politics over the past decade, most notably the emergence of queer identity and of an unrepentant movement of self-described bisexuals, have complicated gay and lesbian communities. New voices are heard, offering a sustained, community-based attack on the idea that subordinated communities should endorse the identities through which superordinated groups suppress them." (footnote omitted)).

[180] *Id.* (referring approvingly to the "attack on the idea that subordinated communities should endorse the identities through which superordinated groups suppress them").

as a starting point for legal and political argument.[181]

In the end, however, it would not really matter even if sexual and gender minorities have had no influence on the construction of the identities that concern us. The fact is that legal argument operates only within the social construct. Even if we resist the notion of organizing around the concept of gay and lesbian identity, the reality is that the law organizes us around it, utilizing the very category some social constructionists would have the LGBT civil rights movement abandon as unreal and/or harmful. But the category is not unreal simply for having been socially constructed, and since it is real, we must try to overcome its harmful origins and consequences rather than simply hope it will go away.[182]

Certainly, it would be possible to challenge the sexual orientation-based distinctions replete in the law by denying the existence of the category itself, arguing that sexual attraction is organized on behavioral and other attributes distinct from the gender-of-object choice. But it is a remarkably weak argument. There are reasons that neither the women's rights nor the African-American civil rights movement attacked the existence of the categories of sex and race, even though the legally significant aspects of these categories are every bit as socially constructed as sexual orientation.[183] Instead, these movements challenged the legitimacy of legal handicaps imposed on one of the classifications (women, Blacks) within those categories.

One of those reasons is the inherent nature of an "equal protection" challenge; it is necessarily comparative. The structure of the argument requires the plaintiff to first identify the group or individual

---

[181] *See* Ian Hacking, *Making Up People*, *in* FORMS OF DESIRE, *supra* note 3, at 69, 83-84 ("[A]fter the institutionalization of the homosexual person in law and official morality, the people involved had a life of their own, individually and collectively. As gay liberation has amply proved, that life was no simple product of the labeling.").

[182] *See* Balkin, *supra* note 92, at 2359-60 (identifying the "status hierarchies" with which the Constitution is concerned as those where the status identity is not "due to any physical property" of the group, but instead is "a contingent fact of *social* history," making the identity "a central feature of one's social existence") (emphasis added). Professor Balkin thus recognized that an identity can be valid and significant for constitutional purposes even if it is not the product of biology or somehow "natural," but instead is the product of social construction. Professor Balkin goes on to ask whether homosexuals exist in an "unjust" social hierarchy. *Id.* at 2361. The answer to that question, he suggests, "does not depend on the existence or absence of so-called immutable characteristics," but rather "on the social meaning of being homosexual." *Id.* These are not, however, distinct inquiries. Balkin ignores the possibility that the presence of immutability (perhaps as the product of social construction) is a crucial aspect of the "social meaning" of homosexuality.

[183] *See* Taylor Saito, *supra* note 151, at 266 ("Many scholars agree that what we call 'race' reflects socially constructed classifications rather than biological realities. Yet race is a construct that has powerfully shaped individual and group identities. It has also influenced the creation and maintenance of social and economic hierarchies which reflect not just differences, but relationships of domination and subordination."); IAN F. HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996); JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990) (discussing ways in which sex and gender are socially constructed).

suffering the harm, and compare that group or individual to someone being treated better.[184] The game itself accepts the existence of classifications,[185] but argues that government has made something more of them than is acceptable under the applicable test.

More fundamentally, it is ironic to hear post-modern lyrics put to a constructionist beat. Social construction tells us that the category exists precisely because the culture has created it by imbuing it with legal, political, and social significance. It is jarring, then, to hear the post-modern constructionist deny the legitimacy of the category "sexual orientation" on the ground that it does not accurately capture the essence (note the term: the essence) of human experience with sexuality. But, of course, the constructionist point is that there is no essential human experience outside of social context. Since that social context includes—indeed, for our purposes is dominated by—the law's acceptance of sexual orientation as a legitimate category, effective challenges must be directed at the distinctions between the classifications.

This difficulty is the mirror-image of the essentialists' over-reliance on the existence of pre-twentieth century people with same-sex attraction. They focus on such historical evidence, even though it does not contradict the argument that the contemporary category of sexual orientation is socially constructed.[186] Similarly, post-modernists focus on the purported invalidity of the contemporary category, positing a future in which it is not the basis upon which people organize social understandings. But their focus on the future is no more helpful than the essentialists' focus on the past.

I grant, however, that this present-oriented analysis inevitably limits the transformative power of equal protection arguments. It does not seek immediately to transcend the social categories in and with which we live. Not too much should be made of this, however; it remains true that legal and social victories can reshape a category, and eventually contribute to a process of erosion that can end at a point where the category loses all or most—or at least the worst—of its meaning. To the extent that the privileged status of the favored group is an embedded characteristic of the category itself, a program of seeking greater equality between the classifications has the important effect of breaking down the category. If, for instance, being subordinated is part of what it means to be Black in our culture,[187] then

---

[184] *See* Rush, *supra* note 30, at 73 ("Analogical reasoning has been an essential component of equal protection analysis since the early 1970s.").

[185] *Cf.* Jane Wong, *The Anti-Essentialism v. Essentialism Debate in Feminist Legal Theory: The Debate and Beyond*, 5 WM. & MARY J. WOMEN & L. 273, 292 (1999) (concluding that in feminist theory, "essentialism is unavoidable because there is always a need to define the category of 'woman,' whether as white and middle-class, lesbian, or racial minority").

[186] *See supra* pp. 689-70.

[187] *See* Farley, *supra* note 27, at 473-74 ("To be thematized as black is a form of humiliation in and of itself. . . . There can be no such thing as good race relations for it is the category of race

every piece of the system of subordination that is removed—i.e., the more equality we achieve within existing institutions—is a step towards breaking down the socially constructed category of race. We should not ignore this important transformative function of equality-based arguments.

But let us suppose that it is more problematic than I believe that my argument begins by accepting rather than transcending socially constructed categories. There remains a simple answer: It is important to distinguish between means and ends. "Category transcendence" may be the goal towards which a legal argument is deployed, *but it is not the argument itself.*[188] Powerful, socially constructed categories must be reckoned with if they are ultimately to be broken down.

B. The Immutability of Orientation's Classifications

Once we recognize that sexual orientation is socially constructed, and that legal argument operates only within that construct, we have established the "constructive" side of "constructive immutability." It remains to establish the immutability of sexual orientation. The core assumption of sexual orientation as a social category is that people can be classified based on the sex and/or gender of those to whom they are sexually attracted. This attribute—being sexually attracted to others based in part[189] on their sex—is experienced as immutable by many individuals (whichever classification they may fit).

There are alternative explanations for this. For those persuaded by the developing scientific evidence of a correlation between biological and/or genetic characteristics and sexual orientation, little more need be said. Although it is possible to imagine an argument that even a genetic explanation for sexual orientation would not establish its immutability, it is evident that those who accept the biological evidence virtually always take the further position that sexual orientation is immutable. For this reason, I will direct this discussion at those convinced that sexual orientation is not genetically linked, or who even believe that object-of-gender choice does not constitute a valid categorizing principle for human beings.

In the last section, I discussed the dynamic nature of the social construction of sexual orientation. It has been in part reactive to the decline of other oppressive forces, in part the product of the felt need for dominant-group differentiation, and in part (and most recently) the creation of sexual and gender minorities shaping their

---

itself which constitutes the humiliation. Blackness is the yellow star, the pink triangle, the scarlet letter, and the bad reputation. To be black *is* to occupy the role of inferior-for-whites, specifically, to be black is to be available for racial humiliation.").

[188] Moreover, I will discuss strategies to enhance the power of the constructive immutability argument to transform oppressive social institutions, *infra* p. 641.

[189] Obviously, sexual object choice is influenced by additional factors—age, appearance, congruence of sexual tastes, to name a few.

own communities. In such an environment, it should hardly be surprising that some people's engagement with the forces prodding sexual and gender conformity will be radically different than others. Moreover, these forces have continued to interact in the last half-century, continuously creating a shifting reality within which people are locating their sexual identity. Consider this possible experience:

> 1960: The force of conformity is so powerful that the 15-year-old's heterosexuality is experienced as entirely natural, unchosen, and immutable.
>
> 1970: The force of conformity has ebbed, so that the 25-year-old may perceive heterosexuality as being a chosen part of her identity, or as having been imposed on her, leading to a process of choice that may produce a different lived sexual orientation.
>
> 1980: The force of conformity has ebbed still further, and the 35-year-old's experience with her sexuality may lead her to dismiss the whole category of sexual orientation as having been imposed on her and reject classification as either homosexual or heterosexual.

This dynamic understanding of orientation and social construction means that the classification may be immutable for some, mutable for others, and a misleading and/or arbitrary label for others. Thus, it is unsurprising that in our culture a large percentage of gay men and lesbians (and heterosexuals, a point that is not often discussed or utilized despite its importance) perceive and describe their same-sex attraction to have been discovered rather than chosen; as relatively fixed, rather than fluid, and as constitutive of *part* of their identity.

For such a hypothetical person, Jane Hopkins, being sexually attracted to members of the same sex is no different than being the biological child of Ann and Andy Hopkins. The first characteristic constitutes her sexual orientation, the second her genetic inheritance. Neither is a characteristic she chose, and neither is subject to change by means of her own conscious, voluntary decision-making.[190] To the extent that we accept autobiography and self-description as valid, this body of evidence supports the premise that sexuality is at least sometimes immutable.[191]

But we need not rely solely on such testimony. Ironically, the social constructionists' persuasive arguments about the constructed nature of sexual orientation actually help to establish the immutability of the classifications of sexual orientation. If we agree that the cate-

---

[190] There are, of course, levels of immutability. The identity of Jane's biological parents is entirely unalterable, while the color of her fingernails is relatively within her control. Characteristics are "immutable enough" if they are not subject to simple volitional, rapid change with no or little psychic or physical harm. A requirement that all employees paint their fingernails red might be wrong on some other basis, but it is not subject to the immutability critique.

[191] I will discuss the significance of the contrary stories related by other people who experience their sexual and gender identity as mutable, *infra* pp. 638-41. Respect for the narratives of immutability does not require silencing or ignoring the alternative narratives of mutability.

gory is socially constructed, the next question must be "What have we built?".[192] In the area of sexuality, one facet of our construct is the rigid social constraints and pervasive system of penalties imposed upon people who do not conform to expectations regarding gender and sexuality. They are so pervasive, in fact, that they operate in the earliest times of our lives, attempting mightily to channel us into the expected classifications. Indeed, *inducing the perception of immutability can be seen as the whole point of the social construct.*

In such a construct, it would be surprising if many of us did not experience our sexuality and gender as received rather than chosen. For those who conform to the constructed norms, it seems the most natural course in the world—the individual hardly differs from a rock made inevitably smooth by centuries of running water. Both the rock and the conformist see their status as immutable; "How could I be otherwise?" each asks.

At the same time, this overwhelming force in favor of the superordinated classification also operates on sexual and gender non-conformists. For them, its significance is not that it makes conformity seem natural and innate, but that it influences the perception of competing drives towards non-conformity. Others have spoken to the crushing force of heterosexist[193] and patriarchal[194] paradigms, but one point has gone unnoted: Resistance to that life-long, omnipresent pressure requires extraordinary counter-forces. Just as the conformist experiences conformity as a natural condition, so too do many non-conformists live their classification as a natural, innate condition, so powerful that not even the most extreme social conditioning could alter it.[195]

This phenomenon, in which both the conformists and non-conformists experience their own identity as immutable, should not

---

[192] *See* James Weinrich, *Reality or Social Construction?*, *in* FORMS OF DESIRE, *supra* note 3, at 175, 183 (noting as evidence that homosexuality is socially constructed that "the pattern of homosexuality differs a lot from culture to culture").

[193] *See* Rush, *supra* note 30, at 90 ("Long before a child is even concerned with marriage, he or she is socially indoctrinated with the heterosexual norm and expectation. The image and idea of heterosexuality are visible almost anywhere—on billboards, television, children's books, the best seller list, movies, theater, and even on the PTA.").

[194] *See* SUZANNE PHARR, HOMOPHOBIA: A WEAPON OF SEXISM 39-40 (1988) (describing the "profoundly sad" impact of sexism on women's lives, including women who "held themselves back from people and things that would not be acceptable in a sexist world," who "took roads prescribed for them, rather than those their hearts yearned for," and as a result "suffered such a toll on their mental health and psychic energy").

[195] Vera Whisman's penetrating interviews with lesbians and gay men repeatedly demonstrate this phenomenon: descriptions of intense social opprobrium from family and friends and the perception that all the suffering and pressure was futile because the individual's orientation was unchangeable. *See* VERA WHISMAN, QUEER BY CHOICE 13-15 (1996) (discussing Noel's initial denial of his homosexuality and belief it was "horrible," but also his perception that, "I just feel it's something innate. I don't think of it as a choice," and Jessica's questioning, "Why was I born like this?" and her mother's response, "You were not born like this. This is what you choose. . . . You could've been with a guy.").

be surprising. When we talk in vague terms about a category like sexual orientation as "socially constructed," we refer to a bewildering array of forces that create social categories and understandings. Social construction posits that the ways in which people identify the nature of sexuality have shifted in so fundamental a way that the category of "homosexual" has come into being in the last century and a half, changing radically just in the last fifty years. It would be surprising if forces sufficiently powerful to transform culture in such a relatively short time did not also have a profound effect on self-identification—profound enough that people experience their sexuality and gender identity as having never been consciously chosen and as being immutable.[196]

What should we make of the widespread (though not universal) perception that one's classification (though not always *other peoples'* classification[197]) within the socially constructed classification of sexual orientation is immutable?[198] Among other things, it is a marker of a vast social system exerting powerful influence over individuals.[199] That system is a status- and norm-preserving one, designed to produce conformity to accepted sexual norms. And the category itself is an integral part of that system—a construct meant, in part, to maintain the dominant position of the superordinated group.[200] In contrast, classifications as to which people perceive a relatively high degree of mutability are those in which the social forces impelling

---

[196] Some relatively mild versions of social construction admit of this possibility. *See* Carole S. Vance, *Social Construction Theory: Problems in the History of Sexuality*, *in* HOMOSEXUALITY, WHICH HOMOSEXUALITY? 13, 18 (Dennis Altman et al. eds., 1989) (discussing theorists who accept that "the direction of desire and erotic interest are fixed," even if its expression and social significance may vary across cultures).

[197] *See* Laura A. Gans, *Inverts, Perverts, and Converts: Sexual Orientation Conversion Therapy and Liability*, 8 B.U. PUB. INT. L.J. 219 (1999) (discussing claims of ability to change homosexuals' sexual orientation through "conversion therapy"). Anti-gay forces repeatedly sound the theme that the sexual orientation of gay men and lesbians can be changed, but they have not been made to answer the question whether the same holds true for heterosexuality. That is one reason why the immutability argument must be made as to sexual orientation in general, rather than homosexuality in particular. *See infra* pp. 641.

[198] Even those opponents of the LGBT movement who ardently deny that sexual orientation is immutable steadfastly refuse to address the issue of whether—assuming they themselves are heterosexual—they believe they could voluntarily choose to alter their opposite-sex sexual attraction.

[199] Of course, there can also be a simpler explanation for the perception of immutability: It could be accurate, and the characteristic (e.g., height) might be immutable wholly apart from the influence of social categories. If so, then the perception (by itself) would not give rise to an inference of sub- and superordinated classifications, although the moral arguments against using it as the basis for legislative classifications would still come into play. *See supra* pp. 670-80. But we are assuming for the sake of the discussion that sexual orientation is immutable only because of the influence of the social construct on individual experience. *See supra* pp. 696-98. Hence, our focus is more narrow: What is the significance of the widespread perception that peoples' classification within a socially constructed categorizing system is immutable?

[200] *See supra* pp. 689-91 (discussing decline of oppressive forces that prevented the expression of same-sex attraction as having produced the need to construct the category "sexual orientation" in which homosexuals would be the subordinated classification).

conformity are less pronounced.

Race demonstrates the correlation between the experience of immutability and a social system of subordination. Racial identity in the United States has been constructed over hundreds of years in a way that has strictly policed the racial line between whites and African-Americans.[201] The legal classification of a person with any Black ancestry as Black has made a person's social race Black—immutably Black—without regard to any contrary self-identification she might develop.[202] The deep connection between this construct of racial purity and systemic racial oppression is plain.[203]

One might respond to this analogy by arguing that the system of racial classification has enforced conformity to racial identities directly through rules assigning people to one race or another, thereby making immutability a legal reality, while the system of sexual and gender conformity has utilized stereotyping and socialization to "fool" people into perceiving their classification as immutable. But this response ignores the reality that racial, sexuality, and gender identity are *all* created and enforced by *both* methods: legal rules establishing classifications, and ingrained social norms. The taboo on interracial marriage, for instance, once took the form of a legal rule enforcing racial identity,[204] but this legal barrier has been replaced by social pressures pushing conformity to the norm of intraracial marriage.[205] And while the experience of sexual orientation as immutable is primarily a function of socialization, the rigid classification system of "Don't Ask, Don't Tell"[206] demonstrates that immutability can be a legal reality in this category just as it can be with race. [207]

---

[201] *See supra* pp. 654-56 (discussing social construction of race rendering status as African-American immutable).

[202] Or even if she never had the opportunity to develop any racial self-identification. *See* Hickman, *supra* note 27, at 1250-51 (relating 1996 story of baby, with white mother and Black father, who died the day after she was born and was removed from an all-white church cemetery a few days after the burial when the Deacons discovered her father's race and "voted to command that the coffin . . . be removed from their graveyard").

[203] *See* Rush, *supra* note 30, at 79 ("The historical and social underpinnings for the 'drop of black blood' rule run far and deep in this country and function to promote the continued subordination of Blacks."). Even in contemporary America, where the racial line is policed less strictly than 100 or even 40 years ago, the opportunity for individual control over social and legal recognition of race remains limited. *See* Hickman, *supra* note 27, at 1250-51 ("There is room for choice but . . . we must remember that even now at the end of the twentieth century, many choices are still made for us because of our race.").

[204] *See* Loving v. Virginia, 388 U.S. 1 (1967) (holding antimiscegenation laws unconstitutional under the Fourteenth Amendment); Hickman, *supra* note 27, at 1179 ("A Negro could not buy out of her assigned race; she could not marry out of it; nor were her children released from its taint.").

[205] *See* SHIPLER, *supra* note 113, at 113 (discussing disfavor with which interracial marriage is still regarded, even as acceptance of integration in other settings has increased).

[206] *See supra* p. 653 (discussing virtually irrebuttable presumption that homosexual "conduct" determines that the servicemember is homosexual).

[207] *See* Yoshino, *supra* note 2, at 556-57 ("'Don't ask, don't tell' must thus be seen as an attempt by the state to sustain the epistemic contract of gay erasure even as that 'contract' be-

Testimony of experienced immutability is, in short, evidence of the presence of social hierarchies, and of superordinated and subordinated groups. This evidence is, in large measure, the reason courts should be wary of legislatures that classify on the basis of immutable characteristics. Such classifications inevitably build on pre-existing structures of disadvantage, save for the rare instance in which the dominant group legislates in a way favoring the subordinated classification.[208] In this observation we discover the rest of the answer to Dean Ely's challenge to "tell us exactly *why* we should be suspicious of legislatures that classify on the basis of immutable characteristics."[209]

It is crucial here not to confuse two quite distinct arguments. The first is that we should be suspicious of distinctions based on immutable characteristics *because of their immutability*. This is not my primary argument. Professor Yoshino has a point when he observes that the premise I have already described—that it is wrong to penalize people for a characteristic that is beyond their power to change[210]—is "widely accepted," giving us no reason to be suspicious of legislators' capacity to "consider [immutability] in making their determinations."[211]

On the other hand, Yoshino's point is undermined by the close link between systems of class-based subordination and the perception that classifications are immutable. Legislators may *in the abstract* recognize the moral sensibility that people should not be penalized for immutable characteristics, but that recognition can be overwhelmed by the legislators' membership in the superordinated social group. Unknowingly, Dean Ely demonstrated this in his own iteration of the process argument when he argued: "Surely one has to feel sorry for a person disabled by something that he or she can't do anything about, but I'm not aware of any reason to suppose that elected officials are unusually unlikely to share that feeling."[212] Indeed. Elected officials

---

comes ever more damagingly removed from any meaningful notion of consent. Although gays are now less prone than they historically have been to having their identities manipulated in the broader culture, the military seeks to retain the anachronism of gay erasure by force of law. To recognize that the state is doing through coercive means what the culture can no longer sustain through persuasive ones is to recognize that the state is exacerbating the manipulation effect suffered by gays."); Chang & McCristal, *supra* note 164, at 255-56 (criticizing Supreme Court's decision in *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), for constructing an identity of "homosexual" that "ignor[ed] their self/group description," and constituted a "refusal to see the real identity that these gay/lesbian/bisexual individuals *as a group* claim") (emphasis added).

[208] This is, I should note, yet another reason that race- or gender-based affirmative action is different in kind from invidious discrimination, even though they share the common characteristic that each classifies on the basis of race or sex. Segregated public schools build upon and reinforce a hierarchy of privilege for whites. Race-based admissions to universities undercut that same hierarchy.

[209] ELY, *supra* note 2, at 150. The immorality of using such classifications, discussed *supra* pp. 670-80, was the first part of the answer.

[210] *See supra* pp. 671-75 (discussing moral dimension of penalizing immutable traits).

[211] Yoshino, *supra* note 2, at 517.

[212] *See* ELY, *supra* note 2, at 150.

are likely to share that feeling. But the "feeling" Ely describes has both an "attitude-toward-immutability" component and a substantive, attitude-toward-disability component, the latter of which is captured in the expression that we "feel sorry" for people with disabilities. Legislators who share the feeling Dean Ely describes will be moved only in part by their attitude towards immutability in general, and much more by the pity viewpoint that creates and perpetuates discrimination against people with disabilities.[213] If the presence of an "immutability sensibility" were enough, legislators would be moved not to feel sorry for people with disabilities, but to recognize their equal status. But instead, because they are predominantly members of the superordinated group of people without cognizable disabilities, they share Dean Ely's unthinking, reflexive reaction of pity.

The point here is not that legislators are ogres, and certainly not that John Hart Ely is an ogre. It is that the process of group subordination leads members of the privileged group to share certain predictable, negative attitudes towards members of the subordinated group(s). These attitudes produce discrimination. Their precise nature varies; it may be disgust in the case of homosexuals, mistrust in the case of African-Americans, and pity in the case of people with disabilities. But whatever collection of attitudes prevails, it will tend to be the basis for the actions of dominant-group members, including legislators.

Well, then, Yoshino and Ely might respond, what we should really be looking for are those attitudes, not for immutability. The difficulty, however, is that courts must look for *all* the indicia that systems of subordination are affecting government actions, decisions, and policies. Certainly, expressions of "feeling sorry" for people with disabilities, or that "all blacks are lazy," or that "all Jews are greedy" must not be ignored. But since the experience of immutability is an indicator of a system of subordination, it is also an indication of the sort of process failure Dean Ely identifies as a basis for judicial intervention, even if attitudes about immutability itself would not suffice. So even if immutability itself is not a sufficient basis for suspecting possible breakdowns in the legislative process, immutability tells us something about the nature of the specific social category under consideration. That "something" is the presence of a deeper system of social subordination, anathema to the purposes of the Equal Protection Clause.

At an even more basic level, individuals are creatures of the social framework into which they are born. The social constructionist posits a Michael Hardwick, born with all of the innate, genetic, biological

---

[213] *See, e.g., D.R. Nation: Pityfests a Thing of the Past? Maybe*, ELECTRIC EDGE, Sept/Oct. 1997, *at* http://www.ragged-edge-mag.com/sep97/drnat9.htm (last visited January 24, 2000) (quoting Easter Seals employee explaining that the organization phased out its telethon in part because it "wanted to avoid pity").

characteristics he possessed, but born in seventeenth-century Russia, and denies that this earlier Hardwick could be gay because the classification itself did not exist for him. Whatever his desires and sexual behavior, he would not have been "gay" in the sense that his twentieth-century doppelganger is. From this, the constructionist concludes that the trait is not immutable.

But the hypothetical is meaningless for this discussion. We are asking how the law (which is of this culture), treats the actual Hardwick (who is of this culture), and his sexual orientation (which is of this culture). They are all part of the same social construct. Indeed, law itself is one of the "constructing" institutions which has created the category[214] and with its numerous and extraordinarily important distinctions between the classifications "heterosexual" and "homosexual" has contributed to the reality that these classifications are experienced as immutable.

This is true even if Jane Hopkins and Michael Hardwick are wrong to perceive their attraction to women and men, respectively, as immutable. Jane's sexual attraction to other women may be the product of a complex series of social interactions; her very understanding of herself as a "lesbian" may be the result of societal labeling and the creation of a category that did not exist in 1799 and will not exist in 2099. Nevertheless, so far as the legal doctrine of equal protection is concerned, and so far as the moral underpinnings of the immutability argument are concerned, it really does not matter whether the characteristic is socially constructed or not; it need only be experienced at the individual level as immutable.[215] In legal and political terms, the important point is that constructive immutability is no less potent than the more simple, essentialist versions of the immutability argument.

Nor is it surprising, though, that Jane Hopkins is not the only voice speaking to this matter. The categories we have constructed are not as well-defined as society pretends, and individual experience with the classifications varies across a whole range of other factors. Perhaps most importantly, the institutions and forces that have constructed the categories by the way they have defined the classifications are themselves subject to ongoing reconstruction. While Jane might be an example of the fifteen-year-old person's perception (that the force of non-conformity is so strong that she experiences her sexuality as entirely natural, unchosen, and immutable),[216] "Terry" Hopkins may represent the twenty-five-year-old in the example, experiencing

---

[214] *See* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 4-6 (1993) (discussing concept of "status quo neutrality" as flawed because it "disregards the fact that existing rights . . . are in an important sense a product of law").

[215] *See supra* pp. 654-56 (discussing definition of "immutability" to include traits experienced as immutable).

[216] *See supra* p. 697-98.

his opposite-sex attraction as a choice, while "Dave" Hopkins may articulate the thirty-five-year-old's understanding that the whole category is meaningless and that his sexual attraction is largely or entirely unaffected by the sex of his partner. There is, in short, a diversity of experiences with the immutability of sexuality, and it makes no sense to decide the merit of the immutability argument looking at Jane, Terry, or Dave as if theirs was the only relevant experience.[217]

What to make of this? Some have worried that reliance on the immutability argument in such an environment risks limiting the gains achieved only to those who experience their sexual orientation as immutable, or at least that it is unrepresentative and therefore disempowering for "mutable gays."[218] Others have observed that it limits the transferability of the gains to other civil rights struggles by creating an immutability "requirement" other groups might be unable to satisfy,[219] and that it shares the limitation inherent in other equality-based arguments that it demands access to but does not transform inherently oppressive institutions.[220] Still others have cited the "pity problem": the fear that the immutability argument presents homosexuality as an "unfortunate condition"—coming dangerously close to accepting the implicit premise that homosexuality is bad—and constitutes a plea for pity rather than a demand for equality and respect.[221]

These fears are not insignificant, but do not provide adequate grounds for rejecting immutability, for both strategic and legal reasons. On the strategic level, sexual and gender minorities face a vexing issue arising out of the diversity of their experiences. Immutability represents just one of these realms of diversity. Even a casual observer of the gay and lesbian rights movement over the past quarter-century has heard the wide range of stories told by individuals—stories that differ in innumerable ways. There are disparate experiences with public and private discrimination, with family relationships, and with the intersections between oppression on the basis of sexual orientation, gender identity, race, economic class, and national origin.[222] Issues of class, race, gender, and ethnicity have all

---

[217] *See* WHISMAN, *supra* note 195, at 6 (noting the gender disparity by virtue of which "the vast majority of gay men in the U.S. do understand their homosexuality as an orientation they did not choose or create," but "lesbian identities span a continuum, from a model of lesbian identity as a conscious political choice to a determinist model like that of most gay men").

[218] *See* Pickhardt, *supra* note 2, at 951 (expressing concern that immutability argument "risk[s] misrepresenting and thus dividing the communities that they should be protecting").

[219] *See* Yoshino, *supra* note 2, at 502 ("The immutability factor withholds protection from groups that can convert, leaving them susceptible to legislation that pressures them to do so.").

[220] *See supra* note 117 (discussing opposition within LGBT community to seeking equal access to marriage because of its patriarchal structure).

[221] *See* Pickhardt, *supra* note 2, at 949 (criticizing immutability argument because it reduces to the question, "'Why would I choose to be something so clearly and utterly undesirable?'").

[222] *See* Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 9-10 (1999) (summarizing prior article in

created tensions about which goals to pursue, how to prioritize them, and how to seek them. Careful assessment of the ramifications of this multi-level diversity is crucial.

Efforts in this regard have been made. Janet Halley attempted to bridge the immutability gap by proposing a legal strategy based on what she called a "merged approach" somewhere between pure essentialism and pure constructivism,[223] based on the observations that some biological traits are not immutable,[224] and that even some constructed traits may be immutable at some levels.[225]

But Halley's proposal of a compromise she calls "weak behavioral constructivism"[226] fails to achieve the common ground she seeks, while forfeiting most of the power of the immutability argument. While she posits the notion that "some *other* form or forms of human variance are primary,"[227] she insists that such essential categories not include "*gender*-of-object choice as the essential substrate of behavioral constructivism."[228] But since lesbians and gay men are classified as such based on their "gender-of-object choice," setting this trait apart as the one thing that cannot be deemed immutable denies those classified as gay or lesbian the ability to argue from immutability.[229] Worse, it denies gay men and lesbians the ability to frame the immutability argument as a helpful narrative. The stories they would tell consist of the very claim Halley places off-limits: that their sexual attraction is primarily to members of the same sex and that they experience this fact of their lives as immutable.[230] Instead of the precise

---

which Hutchinson "asserted that the various social identity categories and systems of oppression are 'inextricably and forever intertwined,' [and] that the failure of gay and lesbian legal theorists to interrogate and challenge racial and class subordination produces essentialist theories that invariably reflect the experiences of class and race-privileged gays, lesbians, and bisexuals" (footnote omitted)).

[223] Halley, *supra* note 2, at 546.

[224] *Id.* at 548.

[225] *Id.* at 552-53 ("[I]t is possible for a constructivist to claim that sexual-orientation identity is mutable across the range of human possibility, without making the distinct claim that it is mutable in a given person, or even in a given society or era.").

[226] *Id.* at 560-66.

[227] *Id.* at 558.

[228] *Id.*

[229] Professor Halley sees her proposal as a compromise because, she asserts, some sexual object choices *other than gender* which might be seen as essential "might be more likely to produce regular correlations" with gender-of-object differences. *Id.* But for gay men and lesbians who experience their orientation as immutable, it is the gender-of-object (and not differences that correlate with gender-of-object) that is the immutable thing. Indeed, the very terminology Halley uses—calling sexual orientation classifications "gender-of-object *choices*"—reveals that her proposal rejects the very premise of the immutability argument: that these are not choices at all. *Id.* (emphasis added).

[230] Some of the most important and moving narratives weave together the experience of immutability with the despair of gay and lesbian young people. The combination of the shame they feel, and the unalterable quality of their status, produces a sense of being "doomed" to a life they have been taught is sinful and disgusting. As one person explained, "I thought *I was destined* to a life of perversity, sickness, loneliness and eternal damnation. I can still remember the pain that made me want to die." *Gay/Lesbian Youth in Crisis, at* http://duke.

story-line testified to by many lesbians and gay men, this approach substitutes an artificial and convoluted tale in its place.

Nor is this exercise necessary to ensure that the gains generated by the immutability argument are shared by lesbians and gay men who do not experience their classification as immutable. If we assume that the immutability argument will have a net positive effect in achieving LGBT civil rights and equality, then the only harmful effect of using immutability would be if that positive effect were not enjoyed by all members of the community it is intended to help. This, in turn, would happen only if the legal and social response to immutability would be to say, "OK, good point. It is unconstitutional and unfair to discriminate against people based on an immutable characteristic, so we'll grant equality to all of you who pass an 'immutability screening.' You others, for whom your classification is a relatively volitional matter, you're out of luck." It should be obvious, I think, that this response is unlikely in the extreme,[231] meaning that all sexual and gender minorities would benefit from the gains produced by use of immutability.[232]

Still, positive legal outcomes purchased at the price of rendering invisible and/or silencing part of the community are of uncertain value—even if that part of the community shares the resulting legal gains. This is the difficulty with Janet Halley's proposal: Even if it meets with courtroom success, it does not include "immutable" gays in its sweep. The same holds true in reverse: Even if "mutable" gays and lesbians share in the gains produced by the immutability argument, the risk of non-inclusiveness remains.

The broader problem is that the diversity of the community—communities, really—of LGBT people poses a genuine dilemma for the lawyer and the political activists seeking a common strategy for progress. With so many quite distinct (sometimes conflicting) stories to tell, it is difficult to settle on one approach that even nears consensus.

---

usask.ca/~ss_glus/youth.html (last visited on Oct. 23, 2000) (emphasis added) (quoting a twenty-three year old survivor of a suicide attempt).

[231] If for no other reason, the response is unlikely because finding a genetic contribution to sexuality would not be the same as allowing confident identification of gay and non-gay people. *See* Spitko, *supra* note 2, at 615-16 n.227 (arguing that potential program of "antigay eugenics" as a reason to avoid reliance on biological and genetic explanations for sexual orientation is "divorced from reality"). The unlikelihood of an "immutability screening" in the case of sexual orientation contrasts with its obvious application as applied to the example of PFB, raised *supra* p. 653. For PFB sufferers, who cannot shave without serious medical consequences, a beard should be deemed immutable, even though it plainly is not for most men. As a result, government should be required to have a better justification for applying a no-beard rule to those with PFB than to others. When the basis for deeming a trait immutable is a medical condition like PFB, it makes sense to limit the benefit of the immutability argument to those diagnosed with the condition.

[232] *See* Spitko, *supra* note 2, at 616 n.227. ("Even those with a same-sex desire who believe that their sexual orientation is 'constructed' and mutable would share in the protection likely to derive from judicial recognition of [the biological influence on sexual orientation].").

Constructive immutability is a consensus-accommodating approach because it is consistent with a heterogeneous portrait of the community. Its agnosticism on the issue of whether there is a biological or genetic basis for sexual orientation—the "nature versus nurture" question—avoids alienating those who find the scientific evidence unconvincing or tentative. It accepts the notion that, while same-sex attraction has existed for centuries (if not millennia), the modern understanding of homosexuality has developed and continues to evolve in response to social, economic, religious, and political forces in the last century. In this way, it validates the sense some have of an innate quality to their sexual attraction, but also the certainty others have that the entire category must be understood as part of a broader system of social subordination, and the perception still others have of a chosen sexuality.

Given its premise that even a socially constructed category can produce immutable classifications, the power of constructive immutability does not depend on proof that the nature of gay, lesbian, bisexual, or transgendered identity is historically fixed. Most importantly, it does not depend on proof that all people experience their sexual identity as immutable—simply that enough of us do to demonstrate the subordinating roots of the category.

Thus, constructive immutability depends on no premise denying the existence of sexual and gender minorities whose identity is volitional and mutable. Nor does it call on them to be silent or fail to include them in the legal and political story being told. Indeed, the fuller understanding of what "immutability" involves—that part of what is immutable is the sense of being an outsider in a culture with different expectations and norms—would comfortably include the understanding of many LGBT people who do not experience their sexual attractions as immutable.

Constructive immutability also has the power, perhaps unique among all equality-based arguments, to make the case to transform social institutions, even as minority groups seek access to them. Constructive immutability emerges from the idea that social categories are an element of a far broader system of subordination, one so pervasive that it produces the experience that a characteristic is immutable even if the category is socially constructed.[233] Building the argument thus not only affords the *opportunity* to call attention to the oppressive and discriminatory qualities of social institutions; it is *required* by the nature of the argument. For instance, rather than calling for recognition of marriages between members of the same sex by idealizing the institution of marriage, constructive immutability could include marriage's patriarchal elements as examples of the broader system of social subordination. Its potential to contribute to institu-

[233] *See supra* pp. 696-702.

tional reform should not be ignored.

Finally, the risk that immutability comes across as a plea for pity is genuine. As Vera Whisman notes:

> If we argue against only the "possible to change" assertion, we leave unchallenged the more insidious assumption that it is desirable or necessary to do so. And to the extent that homosexuality is acceptable only if it is not chosen it remains stigmatized, illegitimate, deviant. Added to that logical weakness is an emotional one; as D'Emilio . . . asks, "Do we really expect to bid for real power from a position of 'I can't help it'?"[234]

However, this risk is a by-product of the unfortunate reality that the debate on this question has focused too much on homosexuality, the classification, rather than on sexual orientation, the category. Janet Halley has written extensively in terms of whether homosexuality is socially constructed, while Rictor Norton answered the constructionists by writing a book entitled *The Myth of the Modern Homosexual.* This is primarily due to the place of sexual minorities as the subordinated group, creating the obvious rhetorical impetus to talk in terms of how those groups should and should not craft equal protection arguments.

While the concentration on homosexuals is understandable, and the rhetorical effect predictable, this is not sufficient reason to eschew the immutability argument. Any argument can be made poorly, but our focus ought to be on the argument's impact if and when it is made well. An argument that sexual orientation is immutable, carefully framed to *emphasize that this is true of homosexuality and heterosexuality,* would avoid the "pity problem."[235] As I will attempt to show in the next section, constructive immutability can achieve each of these goals.

V. A BETTER WAY: CONCRETE USES OF CONSTRUCTIVE IMMUTABILITY

It is relatively easy to propose abstract approaches in the context of a law review article. Translating those approaches into useful arguments is the real test of the proposal's value.[236] In this section, I will

---

[234] WHISMAN, *supra* note 195, at 6 (quoting JOHN D'EMILIO, MAKING TROUBLE: ESSAYS ON GAY HISTORY, POLITICS, AND THE UNIVERSITY 187 (1992)).

[235] *See, e.g.*, JOSEPH STEFFAN, HONOR BOUND: A GAY AMERICAN FIGHTS FOR THE RIGHT TO SERVE HIS COUNTRY 158-59 (relating conversation where Steffan's friend asked whether he could "decide that you're going to be straight . . . to like girls from now on," to which he replied: "That would be just as easy as your waking up tomorrow and deciding that from now on you were only going to be attracted to men."). As Steffan pointed out, "I found it remarkable that he had never viewed my sexuality in the same way that he viewed his own. He had only envisioned it as a deviation from some universal norm." *Id.* at 159.

[236] It is also a test too often ignored or even disdained by authors. *See* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession,* 91 MICH. L. REV. 34, 35 (1992) (criticizing the prevalence in the legal academy of the "'impractical' scholar," who "produces abstract scholarship that has little relevance to concrete issues," with the result that "judges, administrators, legislators, and practitioners have little use for much of the scholarship

sketch out the ways the constructive immutability argument can be utilized in three important realms: the courtroom during constitutional litigation challenging anti-gay discrimination, the legislature during debate over a bill protecting sexual and gender minorities from discrimination, and the intimacy of family life as a teenager explains to her parents that she is gay.

A. Constitutional Litigation

In a case challenging the constitutionality of the military's "Don't Ask, Don't Tell" policy, the immutability argument would have its greatest potency in illustrating the effect of the rigid classification of servicemembers into categories of sexuality, and in tying that classification into the broader social pattern of anti-gay discrimination. It could be framed in the following way:

> The statute and accompanying regulations create an almost irrebuttable presumption that a servicemember is homosexual based on a remarkably broad array of supposed homosexual "conduct." Indeed, the list of "conduct" is so broad that it includes even statements of homosexuality,[237] a breadth expanded still further by a startling array of "statements" the government has, in practice, deemed to constitute statements of a servicemember's homosexuality.[238]

In this fashion, by operation of statute, regulation, and enforcement, the government has created an immutable class of persons who are first defined as homosexual, regardless of their own self-identification, and then discharged from the military. Such rigid policing of the line between a favored and a disfavored group is hardly unknown to American law, and is anathema to the core purposes of the Equal Protection Clause.

The nation's history of racial subordination was marked by a similar legal construction of racial identity, the "one drop" rule by which a person with virtually any Black ancestry was deemed Black, and was then subject to the entire spectrum of legal and social mistreatment ranging from slavery to Jim Crow to segregation. It has been a crucial component of such a system that the line be drawn and maintained so as to preserve the "purity" of the favored group.[239] Thus, this Court

---

that is now produced by members of the academy").

[237] *See supra* p. 653 & note 19 (discussing "conduct" to include "statements").

[238] According to the Servicemembers' Legal Defense Network, the military currently initiates investigations based on private statements made by a servicemember to psychotherapists, doctors, family members, and close friends. Indeed, the military has violated the terms of the policy itself by instructing health care providers and even chaplains to report a person's statements—even ambiguous questions—regarding possible same-sex attraction. *See* SERVICEMEMBERS LEGAL DEFENSE NETWORK, CONDUCT UNBECOMING: THE FIFTH ANNUAL REPORT ON "DON'T ASK, DON'T TELL, DON'T PURSUE" (Mar. 15, 1999), *at* http://www.sldn.org.

[239] *See* Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 30-35 (1991) (proposing that definitions of race are based on interrelated concepts of "white racial purity" and "white domination").

should be deeply suspicious of the *de jure* immutability that the "Don't Ask, Don't Tell" policy has created.

The difficulty is not merely one of an overbroad irrebuttable presumption misclassifying non-gay servicemembers. Instead, the policy is emblematic of an infinitely broader, historical national practice of punishing any expression of deviation from the norm of heterosexuality. This pattern operates across the entire spectrum of our national life and profoundly affects every person in America, straight and gay, almost from the moment we are born.

This Court can put to one side the unhelpful debate over what determines each individual's sexuality. What it must not ignore, however, is the widespread perception—among straight and gay people alike—that sexuality is not chosen and that changing it is not voluntary in any meaningful sense of the term.[240] Most heterosexual Americans would reject the suggestion that they either chose their sexuality or could easily change it. This experience of immutability may be explained in part by genetic and biological factors, but even if that answer is found wanting, it plainly owes much to the enormous pressures our society exerts to conform to the expected pattern of heterosexual identity and conduct. And the lesbian or gay man's contrasting understanding—that her or his sexuality diverges from this norm—must be the product of counterforces sufficiently powerful to overcome the influence of the same lifelong compulsion to conform. Not surprisingly, then, the experience of sexuality as immutable is as common among homosexuals as it is among heterosexuals.

These pressures, which have often taken the form of legal penalties, are symptomatic of a system of subordination. This is true of sex discrimination, where the operation of gender role stereotypes has already been recognized by this Court as a form of sex discrimination.[241] And it has long been true of the racial caste system as well, within which both Blacks and whites have been taught that their race carries with it contrasting roles and limitations, systematically enforcing the definition of race. The fact that sexual orientation is often experienced as immutable, together with the way in which the military policy immutably characterizes servicemembers based on a remarkably broad and rigid definition of "homosexual conduct," indicates the extent to which "Don't Ask, Don't Tell" offends the equality principle embedded in the Fourteenth Amendment.

This example is revealing in a number of ways. First, it demon-

---

[240] *See* Tanney, *supra* note 86, at 139 (describing Liz and John Sherblom's book MUCH MORE THAN SEXUALITY: LISTENING TO 70 GAY PEOPLE TALK ABOUT THEIR LIVES (1996), and noting that "every one of the lesbians and gay men who told their stories spoke of the moment when they understood they were gay," using words like "realized" and "admitted," and that "[n]one used any form of the word 'choice'").

[241] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (acknowledging how gender stereotypes can contribute to sexual discrimination cases).

strates that the factors the Supreme Court traditionally has used in deciding the appropriate level of scrutiny are interlocking rather than stand-alone arguments. The "brief" I have sketched makes implicit or explicit reference to immutability, expected relevance,[242] and a history of discrimination against sexual and gender minorities.[243]

Second, it shows that these factors can be used to support an equal protection argument even in an era of no tiers of scrutiny (or one marked by tiers that are no longer outcome-determinative).[244] Rather than directing the analysis at the category distinct from the actual government policy being challenged, the argument would be couched in terms of how the particular policy being challenged serves or advances a form of inequality that offends the core purposes of the Equal Protection Clause. The advocate would not be aiming for a level of scrutiny when she addresses each of the factors. Instead, she would be establishing the constitutional violation itself by showing the Court that the particular policy ("Don't Ask, Don't Tell") is linked to a broader system of social disadvantaging (a history of discrimination), in many instances creating or reinforcing a perception or experience that an individual's classification is outside his control (immutability) that has no legitimate, rational justification (low expected relevance).

B. Legislative Debate

In a floor debate over a bill to amend the Civil Rights Act of 1964 to add "sexual and gender identity," a Senator or Representative could use constructive immutability to buttress the argument that anti-gay discrimination is irrational[245] and to overcome the inevitable status-conduct distinction that would be raised by opponents of the bill. Such a speech might look something like this:

> I rise in support of the bill. We have heard much from the opponents of this measure to the effect that this Congress should not infringe on the rights of ordinary, decent Americans to act on their deeply held religious beliefs. Indeed, I hold in my hand a letter from a voter in my district, who holds the view that homosexuality is a sin. She tells me that her unwillingness to hire a gay man or lesbian is based on her religious convictions and that it is wrong for this Congress to legislate her beliefs into illegality. This voter, as it happens, has been a neighbor of mine for over

---

[242] *See supra* pp. 658-664 (discussing low "expected relevance" as a factor in the level of scrutiny applied in an equal protection case).

[243] These arguments could and should, of course, be greatly amplified in an actual Supreme Court brief; the history of discrimination, for instance, would need to be documented and traced in careful detail. My purpose here is simply to provide a preliminary blueprint for how the arguments I have made in this article could translate into effective advocacy.

[244] *See supra* pp. 664-68 (discussing developing law that appears to be abandoning or reducing the significance of the level of scrutiny).

[245] *See supra* pp. 674-75 (discussing inadequacy of irrationality-based arguments to overcome the autonomy-based arguments made by opponents of anti-discrimination statutes).

twenty years.

At the same time, I firmly believe that prejudice and hostility towards homosexuals is irrational, based on a devastating and tragic misreading of our religious tradition. Nevertheless, those who take the position on the other side are entitled to their view, and I bow to no one in my adherence to the principle that we should not unduly interfere with individual freedom. If all that were at stake here was my belief that homophobia is irrational, I would try with all my might to convince my neighbor and friend that she should change her mind on this issue—but I would not support a bill forcing her hand.

But this bill is very much in the tradition of the great civil rights advances of the last forty years, from passage of the Civil Rights Act of 1964 to the Americans with Disabilities Act of 1991. Opponents of those laws, too, claimed it was wrong to tell employers whom they had to hire, and businesses whom they had to accept as customers.[246]

But they were wrong, because the fact is that the discrimination barred by these laws was not just irrational. It was also fundamentally wrong, and the same is true of discrimination against gay men and lesbians and transgendered men and women. Most Americans agree with the simple proposition that such discrimination simply is wrong.[247]

But even if they did not, the unfairness is undeniable. In committee hearings, we heard moving testimony from John Smith, a gay man who was fired from his job when his supervisor learned Smith was gay, even though Smith had, for four years in a row, received the highest possible job ratings. When he was fired, the company's only explanation was to hand Smith a pamphlet trumpeting "ex-gay ministries" as a way for Smith to change his "abnormal" and "sinful" sexual orientation.

Smith spoke to the committee about how difficult it had been for him to accept his own homosexuality. As a teenager he had repeatedly attempted to date and form romantic relationships with women, because, as he put it, "All I ever saw and heard on television, on the movies, and from my family told me that's what I was supposed to want." But despite the intense pressure, he knew that was not who he was. It took John many years to accept—not choose, but accept—his sexuality. As he put it, "If everything I saw, heard, and went through didn't make me straight, I finally realized that my being gay just wasn't going to change. And then it hit me: Why should I change? I'm a good person just the way I am."

Think of it. An excellent worker, fully qualified for his job, was thrown out of work for something that had nothing whatsoever to do with his abilities, but rather for a quality that is for him, as it is for most of us, not one he can change.

---

[246] *See* Marcosson, *supra* note 56, at 149-51 & nn.30-36 (discussing autonomy-based arguments made by opponents of the Civil Rights Act).

[247] *See Americans Strongly Support the Employment Non-Discrimination Act (ENDA) and Equal Job Opportunities for Gay and Lesbian People, at* http://www.hrc.org/feature1/tlepoll.html (last visited September 8, 1999) (reporting results of 1997 poll showing 80 % of Americans believe that homosexuals should have equal rights in job opportunities, and that 68 % supported the Employment Non-Discrimination Act, which would bar anti-gay discrimination).

> And even if he could change it, it is unfathomable to me that we would want employers intruding on an area of their workers' lives so fundamentally private and personal. Some have claimed that homosexuality is a choice, at least when it comes to engaging in homosexual conduct. But was John Smith's employer making a decision about conduct? He was never even asked about his conduct, and the very notion that he might have been is chilling.
>
> More fundamentally, is firing people because of their private conduct really any different from firing them for their sexual orientation itself? For those of us who are straight, we take it for granted that part of what that means is that we will, at least sometimes, engage in sex with a person of the opposite sex. And I, at least, would be aghast if someone proposed some sort of bizarre deal that I could be protected from discrimination if and only if I agreed I wouldn't have sex.
>
> The bottom line is that this bill would protect millions of Americans from discrimination that is both irrational and wrong. All of us have a race, and a sex, and we expect not to have that work against us when we apply for a job or rent an apartment. And all of us, straight or gay, have a sexual orientation, and we should be able to expect not to have that work against us, either. I hope you will support this bill.

This speech, like the equal protection brief, illustrates the mutually supporting aspect of immutability and other arguments against discrimination. It does not rest on immutability alone, but uses it as a response once the irrationality argument is met with the answer that government should not infringe on people's freedom to be irrational if they so choose. Even as it lends support to the irrationality argument, immutability is in turn bolstered by the privacy point. When opponents attempt to draw a distinction between status and conduct (i.e., even if the status of sexual orientation is immutable, the individual still chooses to engage in sexual conduct), the advocate can stress the offensive nature of any inquiry into private sexual behavior, while still emphasizing that penalizing a person for sexual conduct is not different in any meaningful way from penalizing them for sexual orientation.

The key point is that when critics of the immutability argument proclaim that it should be abandoned because it does not stand alone as a persuasive argument, they unproductively hold it to an unattainable standard. No argument by itself will carry the day, either in winning an equal protection lawsuit or in passing anti-discrimination legislation. The real challenge—and this is true for almost any advocate in almost any context—is to figure out how all the *partially* persuasive arguments work together to create a *fully* persuasive case.

The legislator's speech also avoids the "pity problem" that can undermine the effectiveness of the immutability argument.[243] John

[243] *See supra* p. 707-08 (discussing potential for immutability argument to descend into a plea for pity).

Smith's narrative affirmed not just that he could not change his sexuality, but also that there was no reason he should want to. And the legislator carefully talks about sexual orientation as a category including both heterosexuals and homosexuals, subtly prompting members of the favored classification to consider their own status as they consider the rules that will govern the category as a whole. To the extent that heterosexuals consider their own status immutable, this will substantially reduce the likelihood that they will equate "I cannot change my status as homosexual" with "Take pity on me—I may do bad things, but I can't help myself."

Finally, the speech also avoids taking a position on the origins of each individual's sexual orientation. In describing John Smith's story, the legislator refers to the intense pressures Smith felt growing up to conform to the expectation of heterosexuality, and simply says that "he knew that it was not who he was." Articulated in these terms, the immutability argument neither accepts, rejects, nor depends upon theories of biological causation.[249] It simply relies on individual experience with sexual identity.

C. Talking

As Tom Stoddard reminded us, neither court victories nor legislative triumphs will achieve genuine equality for sexual and gender minorities.[250] These "rule-shifting" strategies must be accompanied by "culture-shifting" strategies which talk to, educate, and change the hearts and minds of the majority.[251] Some of these can take place on a mass scale—more positive portrayals of lesbians and gay men on television and in the movies, for example. But they must also take place on a smaller scale, via individual conversations with those

---

[249] If anything, the narrative implies that it was a process of socialization—the forces pressuring John to be heterosexual—that he came to understand his gay identity. This at least suggests a link between the social construction of sexual orientation and individual identity. More importantly, however, it argues that the basis for John's identity is less important than his experience with it as immutable.

[250] *See* Stoddard, *supra* note 10, at 969-70 ("New Zealand had already put in place many—although certainly not all—legal reforms for which lesbians and gay men in the United States had longed from the beginning of their (our) movement to assert civil rights.... According to my understanding of the gay rights movement, such a development should cause lesbians and gay men to shed their previous condition of fear and hiding, to—in the argot of our movement—"come out." But, I soon discovered, most gay people in New Zealand still did not feel safe enough to "come out," even though their laws now offered them protection.... I was confounded by my discovery. As a lawyer working for social change, I had assumed—and hoped—that changes in the rules that governed a society would inevitably lead to some form of larger cultural transformation.... But my trip to New Zealand suggested that I was mistaken in my assumptions about the ways that the law acts as a catalyst for social or cultural change.").

[251] *See id.* at 975-76 (attributing the culture-shifting success of the Civil Rights Act of 1964 to "a continuing passionate and informal national debate of at least a decade's duration ... over the state of race relations in the United States," which "took place every day and every night in millions of homes, schools, and workplaces").

around us. One example: coming out, as in a teenager's dialogue with her parents. Immutability can be just as crucial to her conversation as it can in legal fora.

> Dear Mom and Dad,
>
> It's been six months now since I left home to start college. It's been so amazing here—the professors, so much studying. I know, you've heard all about it already!
>
> But there's something else I need to tell you about, and it's so hard even to write this. Please forgive me for not talking to you both about this face to face, but I just don't think I could get the words out.
>
> So here goes . . . I'm a lesbian. God, I can't even believe I just wrote it. Then again, you probably can't believe you just read it. Daddy's little girl, a lesbian. I can guess what you're thinking. How can that be? She played with dolls, she never played sports, she dated Jerry all through high school. None of the things you probably thought would be sure signs. Don't deny it, Mom—remember when you asked me if David might be "that way" because he *didn't* try out for sports?
>
> But you know, none of that matters. I played with dolls because those were the toys I had, and the ones my friends wanted to play with. And I guess they were fun, at least for a while. And I didn't try out for sports because I was afraid to. I was afraid it would be a dead give-away, and then everyone would know my secret.[252] That's why I dated boys, too. Jerry was so nice, not like most of the guys in high school. He never pressured me to have sex, even though he wanted to. And by going out with him, no one would suspect that I was attracted to girls. That's so awful—Jerry was a disguise, I guess. But it's true.
>
> But he wasn't only a disguise. That's kind of the way I think of him now, but at the time, it was more, hey, if I date him and kiss him, if I just *do* all the stuff everyone else is doing, I'll be like them, and then hormones or instincts or whatever it was that was supposed to make me start actually *wanting* to be with him would kick in.
>
> But all that time, it didn't happen. Instead I looked at girls in school, and thought about being with them, and wanted a girlfriend! You probably don't want to be reading this. When my friend Ben, who's gay, told his parents about how much he was attracted to men, his dad said it made him sick to his stomach and he threw Ben out of the house and told him never to come back.[253]
>
> Please don't think that. It's who I am, or part of who I am at least, and I couldn't bear it if I knew that who I am makes you want to vomit.

---

[252] This fear of being discovered is due in great part to the enormous social consequences that result when gay and lesbian teenagers come out. *See* Teemu Ruskola, *Minor Disregard: The Legal Construction of the Fantasy That Gay and Lesbian Youth Do Not Exist*, 8 YALE J.L. & FEMINISM 269, 303-04 (1996) (discussing abuse during high school that renders gay and lesbian youth invisible).

[253] This is not an exaggeration. *See* Tanney, *supra* note 86, at 103 (relating story of a teenager whose father responded to his coming out by saying, "[w]hen you commit suicide, I'll help you.") (citing LIZ SHERBLOM & JOHN SHERBLOM, MUCH MORE THAN SEXUALITY: LISTENING TO 70 GAY PEOPLE TALK ABOUT THEIR LIVES 65 (1996)).

> It's not a phase, if that's what you're thinking.[254] I don't know why I'm this way. To be honest, I can't imagine what it's like *not* to be this way. Just like you guys can't imagine being anything other than what you are, I guess. And you know what? I can finally say that I wouldn't want to change even if I could. I'm happy with who I am, including being a lesbian.
>
> Oh, I know what else I wanted to say. You told me once, Mom, that looks aren't so important, that you really fall in love with the person inside the body, because they're kind and gentle and generous and funny. And I knew as soon as you said it that it was true. And the more I thought about it, I realized that if it's the person inside that matters, then it was OK if that person happened to be a woman. Does that make sense? Maybe not. But I know it helped me feel like a good person even when sometimes I was just sure I was totally bad because of being a lesbian.
>
> I love you both.
>
> Ann.

This letter is a personal narrative, one that would not be told by everyone in the gay, lesbian, bisexual, and transgendered communities.[255] But it is Ann's story, and it is crucial to her message that her parents understand that being a lesbian is not a "phase," but instead is a permanent feature of her character. They must also hear of the pressures she always felt to conform, and conceive of her sexuality not as a function of outward traits like playing sports (or even having sex with women), but as a part of her identity.

It would be incoherent for Ann to mute the immutability thread in her narrative. If "coming out" is an essential feature in a campaign of "culture-shifting,"[256] then it should be apparent that the goal is to

---

[254] *See* Colleen A. Sullivan, *Kids, Courts and Queers: Lesbian and Gay Youth in the Juvenile Justice and Foster Care Systems*, 6 LAW & SEXUALITY 31, 43-44 (1996) (cautioning that "it's just a phase" and "you're too young to know" can be typical responses parents give when a child discloses sexual difference) (citing TWO TEENAGERS IN TWENTY: WRITINGS BY GAY AND LESBIAN YOUTH 26, 37, 51, 75, 101, 112, 167, 172 (Ann Heron ed., 1994)).

[255] A very different story can also include immutability as an important element. Professor Elvia Arriola's discussion of Jesse, the central character in Leslie Feinberg's novel STONE BUTCH BLUES illustrates this:

> Feinberg's character, Jesse, struggles from the time of childhood with her sexual and gender identity by dressing up in her father's clothes. One day Jesse runs away from home because she is fed up with being humiliated for her cross-dressing or harassed by her school peers for her emerging identity as a different kind of girl. She runs, looking for the people and the places that will accept her for liking girls and dressing up like a boy. . . . There are many underlying tragedies in Jesse's story, including the loss of loves never forgotten. The tales of brutal violence she and her butch buddies experience for their mannish dress and demeanor draw attention to the historic role that violence has played in the lives of those women and men who most obviously transgress society's gender norms—such as butch lesbians and drag queens. *But Jesse's story is also an account of an adolescent girl and a young woman painfully butting up against gendered norms she felt she could not obey.*

Elvia R. Arriola, *The Penalties for Puppy Love: Institutionalized Violence against Lesbian, Gay, Bisexual and Transgendered Youth*, 1 J. GENDER RACE & JUST. 429, 433 (1998).

[256] *See* Kay Kavanagh, *Don't Ask, Don't Tell: Deception Required, Disclosure Denied*, 1 PSYCHOL. PUB. POL'Y & L. 142, 156-57 (1995) (discussing research showing that heterosexuals with openly

shift the culture to a place that is open and accepting of sexual minorities as we really are. That is true of a teenager's disclosure of her sexual identity to her parents, and it is true of the way sexual and gender difference is presented to a broader audience via mass media.

Finally, the immutability narrative, whether related in living room conversations, on television talk shows, in congressional debate, or in courts, must be told together with another message Ann sent to her parents: Even if she could change, why should she? Immutability is part of who some gay, lesbian, bisexual and transgendered people perceive themselves to be. It is also one reason why it is wrong to discriminate against sexual and gender minorities. But it is not a necessary element of a demand for equality and respect. It must also not be understood to be an implicit assent to the notion that if only it were not immutable it should be changed, or, worse yet, that the law could legitimately coerce the decision to change.

CONCLUSION

Immutability has been prematurely dismissed by constitutional scholars. It captures an important moral imperative, long reflected in our law, that the immutability of a characteristic is one factor in the way people ought to be treated. The idea is neither complex nor revolutionary—in fact, its simplicity and consistency with the legal landscape are important factors explaining immutability's power. The insights supplied by social construction theory, which to this point have been seen as debunking immutability, actually help us to understand its validity. A trait can be immutable because genetics made it that way, or because customs made it that way, or because legal rules made it that way, or because some unquantifiable combination of factors made it that way. Standing alone, it is not sufficient to justify legal or social change, or establish a constitutional violation. That should be no surprise; few arguments are sufficient standing alone to accomplish those tasks. Fortunately, though, those seeking change rarely are limited to a single argument standing alone. That is why it is important to make the fullest and best use of all the arguments, in combination. Immutability should be part of the mix.

---

gay acquaintances are more likely than others to accept gay people in general).